This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at http://books.google.com/

HDI
HL 4499 L

VERITAS

HARVARD LAW SCHOOL
LIBRARY

Received APR 21 1939

R. CAMBRAY & CO.
Law & Oriental Booksellers
and Publishers,
CALCUTTA.

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

V. SUBRAMANIAH
BOOK BINDER
CANCELLED
CT

A TREATISE

ON

INHERITANCE, GIFT, WILL, SALE AND MORTGAGE;

WITH AN INTRODUCTION

ON THE LAWS OF THE BENGAL PRESIDENCY.

BY F. E. ELBERLING, ESQ.

OF THE DANISH CIVIL SERVICE.

Nulli me mancipavi, nullius nomen fero. Multum magnorum virorum judicio tribuo: aliquid et meo vindico. SENECA.

(Serampore 1844.)

Madras:

J. HIGGINBOTHAM,

MOUNT ROAD.

1865.

IN
913
ELB

Digitized by Google

TX
E372

PRINTED BY C. D'CRUIZ AND CO.—AT THE ARYAN PRESS.

4|21|39

APR 21 1939

Digitized by Google

PREFACE.

In the performance of his official duties the Author has strongly felt the necessity of a somewhat more then superficial knowledge of the law of the country. The legal provisions that the Mahomedan and the Hindu Law are to be expounded by the Law officers, and that not even the smallest particle of positive knowledge of the essential part of the existing law is therefore requisite for a judicial functionary, may have been proper at the time, and may still be convenient to many, but it hardly comports with the opinions prevalent in the present age of the duties and capacities of a Judge; nor can any enlightened and conscientious man *willingly* follow the opinions of men, to whose legal knowledge and integrity little, if any, deference can be paid. To apply for information regarding the mere rudiments of the law, as, for instance, whether a Mussulman who has relatives, can dispose of his whole estate by will; whether Dower is a gift under the Mahomedan Law; or whether a Hindu widow has the unlimited disposal of her husband's Estate, and so forth, is derogatory to the respectability of the office and of the functionary, and in very intricate matters, it is scarcely possible, without some knowledge of the principles which rule the legal points in the case, to put the requisite questions to the Law officers, so as to secure a clear and satifactory answer. At present it is far from uncommon for the Courts to disregard the legal provision, and to decide even doubtful questions of Mahomedan or Hindu Law without any reference to the opinion of their Law Officers; and insignificant as the legal knowledge of a Judge might have been in former times, their actual knowledge is undoubtedly far greater, and may reasonably be expected to

Digitized by Google

increase in the same proportion as access to it becomes facilitated.

The difficulty of obtaining the necessary information is at present not inconsiderable. There are certainly materials enough in the English language from which it may be obtained, even without much oriental knowledge, but the matter is neither arranged in such a manner as to be easy of access, nor are all the works easily obtainable, even at the high prices at which they are sold. To make a compilation from these works of what is of practical use, to ascertain, as far as can be done, what is actually law, and to arrange the subjects in such a manner that the principles may be easily understood, and their application in practice ascertained, may not therefore be a superfluous undertaking, especially at the present time when some knowledge of the law is required of those who are candidates for the inferior judicial situations.

The principles which have guided the author in arranging the different subjects, may, he hopes, be easily seen from the compilatiou itself. It appears to him to be beyond doubt, that there must be *a civil law* of the country, that the Regulation law neither is, nor ever was intended to be *the civil law*, and that it cannot therefore reasonably be any other than the Mahomedan law. If this be admitted, the other laws contain only exceptions to and alterations of this law. Those whose Christian feelings are opposed to the recognition of the Mahomedan Law as the real law of the country, ought to remember that uncertainty of law is one of the greatest evils to which a nation can be subjected, and that an uncertainty which is generally acknowledged to exist, can never be lessened, or removed, as long as the different systems of law are treated as so many separate laws and systems, and not as one system with unavoidable and necessary exceptions. By acting upon one principle, an equitable practice may by degrees

Digitized by Google

amalgamate and consolidate the different systems so as to render them a fit and good foundation for a general law for the whole country.

It was the Author's intention to have compiled a complete system of the civil portion of the existing law, but the time which would be required for completing it, the difficulty he might expect in bringing it through the press, and the diffidence he felt of his own abilities, induced him to complete at first only a part of his design to ascertain the opinion of the public. Circumstances have since occurred, that may soon recall him to his native country, but even should he never be able to accomplish his original intention, he trusts that the present compilation will not be found wholly useless, and that it may induce other and more competent persons to carry his design into effect.

The Author gratefully acknowledges his obligations to his friend Mr. Marshman, who in going over the proof sheets, pointed out and corrected many obscurities and errors in the language.

Serampore, January, 1844.

Digitized by Google

CONTENTS.

Book I.—*On the loss of the Bengal Presidency.*

		Sections.
Chapter I.	Introduction,	1— 12
II.	On the Mahomedan Law,	13— 21
III.	On the Hindu Law,	22— 35
IV.	On the Regulation Law,	36— 39
V.	On Precedents and Customs,	40— 44

Book II.—*On Inheritance.*

Chapter I.	On Succession to Property in general,	45— 54
II.	On Executors, Administrators and Curators of Estates,	55— 79
III.	On the Right of Inheritance in general,	80— 85
IV.	On the order of Succession according to Mahomedan Law.	
	1. General remarks,	86— 89
	A. According to the doctrine of the Soonees.	
	2. Order of Succession,	90— 95
	3. On Sharers,	96—112
	4. On Residuaries,	113—120
	5. On distant Kindred,	121—127
	6. On the Return,	128—130
	7. On Impediments to Inheritance,	131
	8. On the distribution of the Estate,	132—138
	B. According to the Doctrine of the Shiites.	
	9. On the Order of Succession,	139—148

Digitized by Google

Sections.

CHAPTER V. On the Order of Succession according to Hindu Law.
1. Introduction,.................. 149—154
2. On the Order of Succession in general,.................. 155
A. According to the Bengal School,.................. 156—179
B. According to the Benares and Mithila School,......... 180
3. On the Succession to the Property of a Devotee, &c...... 181—182
4. Order of Succession to a Woman's peculiar property,.. 183—187
5. On Impediments to Inheritance,. 188—190
6. On Partition of the Estate,...... 191—210

VI. On the Order of Succession according to English Law.
1. Introduction,.................. 211—212
2. On the Succession of Husband and Wife,.................. 213—217
3. On the Succession to real Estates,.................. 218—223
4. On the Succession to personal Estates,.................. 224—232

VII. On the Order of Succession according to Portuguese Law.

VIII. On the Rights and Obligations of the representatives of a deceased Person,.................. 234—255

BOOK III.—*On Gifts.*

1. On the requisites to a Gift,.................. 256—261
2. Who can make Gifts,.................. 262—268
3. Who can receive Gifts,.................. 269

Digitized by Google

Sections.

4. What can be the subject matter of Gifts, 270—281
5. On pious Gifts,............................ 282—284
6. On the form of a Gift,...................... 285
7. On the Effect of a Gift,.................... 286—291

Book IV.—*On Wills.*

1. On Wills and Codicils in general......... 292—293
2. Who can make a Will..................... 294—296
3. In what manner a Will is to be made and attested.............................. 297—306
4. How a Will may be annulled, revoked or altered.................................. 307—308
5. On the effect and interpretation of a Will 309—325

Book V.—*On Sales.*

1. On the requisites to a Sale.............. 326—333
2. Who can sell and purchase.............. 334—335
3. What things can be sold.................. 336—339
4. On the form of a Sale..................... 340—342
5. On Sale by Auction........................ 343—344

    1. Sale of Estates for Arrears of public Revenues.............................. 345—357
    2. Sale of Putnee Talooks for Arrears of Rent due to the Proprietor...... 358—367
    3. Sale of Personal Property for Arrears of Rent.................... 468—376
    4. Sale of Real and Personal Property in Execution of Decrees........... 377—390

6. On the Obligations of the Seller......... 391—406
7. On the Obligations of the Purchaser... 407—409
8. On the Annulment of a Sale............ 410—419
9. On the effect of the Annulment of a Sale 420—431

Digitized by Google

Book VI.—*On Mortgage and Pawn.*

		Sections.
1.	On the requisites to a Mortgage and Pawn	432—435
2.	Who can mortgage, or pawn property	436
3.	What things are capable of being mortgaged or pawned	437
4.	Form of a Mortgage, or Pawn	438
5.	On usufructuary Mortgage or Pawn	439—441
6.	On conditional mortgage, otherwise called Bye-bil-wuffa, or Kut-cubaleh	442—449
7.	On Mortgage established by Law	450
8.	On the Rights and Obligations of the Mortgagee, or Pawnee	451—456
9.	On the Rights and Obligations of the Mortgager, or Pawner	457—461
10.	On the Effect of a Mortgage or Pawn	462—469

Digitized by Google

A CATALOGUE

Of the books which have been consulted in compiling this treatise.

Baillie, Neil B. E. the Mahomedam Law of Inheritance, according to Aboo Huneefa, and his followers, Calcutta, 1832, 8vo.

Blackstone, Sir W. Commentaries on the laws of England, 4 vols. 8vo.

Circular Orders of the Sudder Dewanny Adawlut, from 1796 to 1839, vol. 1 to 3, Part 1 and 2, Calcutta, 1828 to 1840.

Colebrooke, H. T. Treatise on Obligations and Contracts, London, 1818, 8vo.

——— Supplement to the Digest of Regulations and Laws, Calcutta, 1807, (containing the repealed Regulations enacted prior to the year 1793.)

Considerations on the Hindu Law, by Sir Francis Macnaghten, Serampore, 1824, 4to.

Constructions by the Court of the Sudder Dewanny of the Regulations and Laws of the Presidency of Fort William, Calcutta, 1833, vol. 1 to 3, Part 1 to 3.

Daya Bhaga—two treatises on the Hindu Law of Inheritance, viz. Daya Bhaga of Jimuta Vahana, and the Mitacshara on Inheritance. Translated by H. T. Colebrooke, Calcutta, 1810, 4to.

Daya Crama Sangraha, an original treatise on the Hindu Law of Inheritance. Translated by P. M. Wynch, Calcutta, 1818, 4to.

Digest of Hindu Law, on Contracts and Succession. Translated by H. T. Colebrooke, Calcutta, 1797, 4 vols.

Eagle, W. Practical instructions for the making of Wills. London, 1838, 12mo.

Galloway, Observations on the Laws and Constitution of India, London, 1832, 2d edition, 8vo.

Digitized by Google

Government Gazette, Bengalee, commenced July, 1840.

Guide to the Civil Law, by J.C. Marshman, Serampore, 1842, 8vo. (containing all the unrepealed Regulations, Acts, Constructions and Circular Orders.)

Halhed, N. B. A Code of Gentoo law or ordinations of the Pundits. London, 1776, 4to.

Harington, J. H. Analysis of the Laws and Regulations for the Presidency of Fort William, London, 1821, 3 vols. folio.

Hedaya, the, or Guide, a commentary on the Mussulman laws. Translated by Ch. Hamilton. London, 1791, 4 vols. 4to.

Jones, Sir W. Works, London, 1791, 6 vols. 4to. (containing a translation of the Sirajijyah.)

Loveless, P. The law's disposal of a person's Estate. 4th edition, London, 1787, 8vo. 10th edition, 1809.

Menu, Institutes of Hindu Law, or the ordinances of Menu. Translated by Sir W. Jones, Calcutta, 1794, 4to.

Mitacshara on Inheritance, see Daya Bhaga.

Norton, G. Rudimentals. Madras, 1841, 8vo.

Principles of Mahomedan Law, by Sir W. H. Macnaghten, Calcutta, 1825, 8vo.

Principles of Hindu Law, by Sir W. H. Macnaghten, Calcutta, 1828, 2 vols. 8vo.

Regulations and laws enacted for the Presidency of Fort William, by H. White, from 1793 to 1834, 8 vols. 4to.

Strange, Sir Th. Hindu Law, principally with reference to such portions of it as concern the administration of Justice in the King's Court in India, 2 vols. 8vo. London, 1830.

Sudder Dewanny Adawlut. Reports of cases determined in the Court, from 1791, to 1834, new edition, 5 vols. Calcutta, 1827—1843.

Toller, Sir S. The law of Executors and Administrators, 4th edition, London, 1818, 8vo.

Digitized by Google

BOOK I.

ON THE LAWS OF THE BENGAL PRESIDENCY.

CHAPTER I.—INTRODUCTION.

Before the Mussulman invasion.

1. IT seems probable that in ancient times and before the invasion of the Moguls, India has ever been the scene of internal wars and convulsions. There is no reason to suppose that any considerable portion of the country ever long enjoyed peaceful repose under a strong and just Government, and still less are there traces of any settled plan of administration under laws regularly framed and observed. The country seems to have been divided from the earliest times into numerous petty states, which their several rulers governed on no other principle than their arbitrary will.[1]

1 Norton 140.

From the Mussulman invasion to 1757.

2. About the year of Christ 1000, the Mussulmans began to invade the country and gradually subjugated one portion after another until Aurungzebe, towards the year 1700, brought the greater part of the country under him, and rendered even the petty states which he spared, mere dependents on his favor and protection. If there was ever any regular Hindu Government in India, which is very doubtful, and if the Hindu law ever was administered, it must have been at this time, but it is certain that in those parts of India in which the Mahomedans became masters, justice was every where administered by Mahomedan Judges (Kazees) who of course decided according to Mahomedan Law.[1] According to the Mahomedan law it is *mandatory* and not optional with the ruler to establish the law of Islam within the Mahomedan dominions, and even questions of inheritance between persons who were not of the Mahomedan persuasion were decided by the Mahomedan Law.[2] Several Mahomedan Kings have also framed distinct laws for the country. Thus Ghazan Khan (year 1260,) caused a code of Regulations for his dominions to be

Digitized by Google

prepared.[3] Timour (year 1327,) framed "his Institutes,"[4] in which he says, that he established his Kingdom on the religion and law of Islam; that the first of his Regulations was to promulgate the religion and law of Mahomed in every town, city and province, and that he regulated his empire by the Mahomedan religion and law. Akbar's "Institutes" (year 1556,) agree almost literally with those of Timour, and both are in all essential points strictly comformable to the Mahomedan law, combined with other regulations suitable to the times and to the mixed populations of the empire,[5] and Aurungzebe's famous code of laws, (1658 to 1707,) prepared for the use of the judicial and revenue officers called the Futwah-ool-Alumgeree, is strictly a Mahomedan law.

1 Galloway, 11.

2 "A non-moslem subject shall not take (inherit) in virtue of a marriage which by *our* law is illegal. (Zeylaaee, Surauj, Moheet.) Non-moslem subjects shall take among themselves by *blood* and by *compact* as Moslems take among themselves. The progeny of a marriage, which is legal *by their sacred books,* though illegal by our law, shall not be debarred from inheriting, but the parties to a marriage, which is illegal by our law, shall not take in virtue of such marriage. Futwa Alumgeree, Ch. Inherit. Hedaya 4,538.

3 New Asiatic Miscellany, 171.

4 Institutes of Timour. London, 1782, pp. 159, 177.

5 Galloway, 24.

Laws of the country.

3. Yet though in this period the general law of the land must have been the Mahomedan law, it is not impossible that the Hindoos in their dealings between themselves, and in the division of the property of their ancestors, may, under the Mogul Government, have followed their own laws as expounded by the Brahmins, but as soon as any controversy between them came before the Court, the decision was passed by the Moslem Judge conformably with the Mahomedan law,[1] and as the Mahomedans had been in power for more than eight centuries at the time the Company obtained possession of the country, (1757,) it is reasonable to conclude that the Hindu law had *then* become nearly totally extinct and antiquated, and that the Mahomedan law, modified by local customs, was the real law of the land.[2]

1 Dow, Pref. 36.

2 Galloway, 28, 286. Hamilton, Pref. to Hedaya v, Edin. Rev. 18, 359. Mill says, 1,437, on the authority of Orme: "that after the Mahomedan conquest the Hindoos continued to be governed by their own laws and institutes."

Digitized by Google

Under the East India Company.

4. The Company obtained the Dewanny (the revenue authority) of Bengal, Behar and Orissa, in 1765, (12th August,) and the Nizamut (the criminal authority) in the same year, but did not invest their servants with the immediate management of the revenue or the administration of justice before the year 1772, the reason of which, as well as the future uncertainty of the laws, must be sought in the history of the Company, and the powers delegated to it by the mother country.

History of the E. India Company; Chartered in 1600 as a trading Company.

5. The East India Company was originally merely a trading Company chartered by an Act of Queen Elizabeth in the year 1600. The Company established different settlements in India for trading purposes, and in the year 1661 obtained authority *to judge according to the laws of England* all persons living under them at their settlements, and to make war and peace with all native states. By a subsequent charter in 1683, and another in 1686, the Company was authorized to erect Courts of Justice, and to appoint a person learned in *the civil law* and two merchants, to be Judges of them, and also to appoint Courts for the trial of offences committed at sea.

The vast conquests made by the Company from the year 1749 to 1765 required the approval and confirmation of the British Government. The importance of these conquests was not then generally understood in England, and it was the interest of the Company to make them appear as unimportant as possible, to obtain confirmation of these possessions from the British Government; and *thus* the confirmation was obtained by two temporary statutes in the years 1767 and 1769.

Obtained temporary confirmation of their conquests in 1767; and extended powers in 1773, for twenty years, but their legislative powers were very limited, and the laws were subject to the

6. Though the importance of the possessions soon became better understood, and there arose some intention to take possession of the conquered countries for the Crown, yet the Company obtained a charter in the year 1773, confirming them in the possession for twenty years, with extended powers. With respect to legislative power, this statute went in the mean time no further than to grant to the settlement of Fort William and other factories and places subordinate thereto, the power of making rules, ordinances and regulations for *good order*, and civil government, the breach of which was to be punished with *fines* and

Digitized by Google

firmation of the Supreme Court.

forfeitures. They were to be just and reasonable, and *not repugnant to the laws of England,* and they were not to be valid or of any force unless, or until, they received the consent of and were recorded by the Supreme Court of Judicature in Calcutta. What was to be the course of justice for the Natives was left undecided, but according to the constitutional law of England,[1] when a new country is added to the dominion of the Crown, the people of the country are to be governed according to their old laws, *until* they are changed by the supreme authority of the state—and all English subjects who come to reside within this new country, are to be governed by their own laws, as far as they are applicable to their circumstances in that country.

1 1 Black Com. 107.

Disputes with the Supreme Court about the extent of its authority caused extended legislative powers to be granted in 1781, to the local Government.

7. In consequence of the authority which had been given to the Supreme Court of judicature in Calcutta, by the charter of 1773, the Judges of that Court claimed authority not only over all the Company's servants, from the Governor General downwards, and other Europeans residing in the country but even over all the native inhabitants and all the native Courts, by which the English Law would have become the law of the land, only so far modified as those Judges would have allowed. A continued series of disputes arose in consequence of this between the King's Court and the Council, which were at last brought before the British Parliament; and as all competent persons agreed then, as well as afterwards, that the introduction of the English law into India would be equally iniquitous and impolitic,[1] a statute of 1781 exempted all judicial acts of the Mufussil Courts from the interference of the Supreme Court, and conferred on the local Government a more extensive and unrestricted power of legislation. The Governor General of Bengal was authorised to enact "Regulations for the Provincial Courts and Councils," which were to be "of force and authority to direct the said Provincial Courts," subject to revision *by the Executive Government* of England. Regard was to be had to the civil and religious usages of the Natives. Hence it was enacted "that the rights and authorities of fathers of families and masters of families according as the same might have been exercised by the Gentu and Mahomedan law shall be pre-

Digitized by Google

served to them respectively within their said families, nor shall any acts done in consequence of the rule and law of caste respecting the members of the said families only, be held and adjudged a crime, although the same may not be held justifiable by the laws of England." Disputes about inheritance and succession to lands, rents, and goods and all matters of contract and dealing between party and party were to be determined in the case of Mahomedans, by the laws and usages of Mahomedans, and in the case of Gentus, by the laws and usages of the Gentus, and where only one of the parties was a Mahomedan or a Gentu, by the laws and usages of the defendant.[1]

[1] Galloway, 312; Harington, I. 6. 10.

[2] 21 George III. c. 70, Sect. 17, 18. This had already been enacted by the local Government, see Reg. 21, Aug. 1772, Sect. 22, 23.

New Charters have been granted to the Company in 1793, 1813 and 1833;

8. The Government of India was delegated by the British Parliament to the Company in the years 1793, 1813, and 1833, on each occasion for twenty years. The last Charter will expire on the 30th of April, 1854. The statute of 1793, is, on account of its comprehensiveness, generally denominated, the Charter Act for India. With regard to the legislative power of the local Government, it repeats the statute of 1781, but in 1797 it was ordered that all regulations affecting the *rights*, *person* or *property* of the Natives or others, who were amenable to the Provincial Courts should be registered and formed into a regular code.[1] The last charter extends the legislative powers of the local Government to all kinds of law, over all parts of British India, so as even to affect the Supreme Court. Still in preparing laws and drafts, due regard is to be had to the laws of marriage and the rights and authorities of fathers and heads of families. 3 and 4. Will 4. 88.

and by the last charter the legislative power of the local Government has become nearly unlimited.

[1] This had already been done by the local Government, see Reg. 41, 1793.

Law of the country under the Company.

9. It has been observed (Sect. 3) that the Hindu law was antiquated, and that the Mahomedan Law, modified by local customs, was the real law of the land, when the Company obtained possession, but it has been generally stated that the administration of justice by the Mahomedan Judges at that time was very corrupt. The Company's want of authority to pass local laws on the one hand, and the inclination of the Judges of the King's Courts to introduce the English law on the other hand, connected with an in-

Digitized by Google

sufficient knowledge of the real merits of the different laws of the country, easily explain why no definite rule was ever laid down. The first Regulation passed for the administration of justice was the Regulation of August 21st, 1772, by which the Hindu law was to a certain extent revived. The 23d Section prescribes: "That in all suits regarding inheritance, marriage, caste and other religious usages, or institutions, the laws of the Koran with respect to Mahomedans, and those of the Shaster with respect to Gentus, shall be invariably adhered to." The 22d Section orders: "that in all cases of disputed accounts, partnerships, debts, doubtful or contested bargains, non-performance of contracts and so forth, it shall be recommended to the parties to submit the decision of their cause to arbitration," but it is no where mentioned by what law the award is to be regulated; the Regulation cannot therefore refer to any other than the one then generally used, that is to say, to the Mahomedan Law.

Hindu law partly revived by Reg. 21st of August 1772.

No rule laid down for decisions about matters of contract, &c.

10. The 23d Section of the above Regulation is re-enacted in Reg. 4, 1793, the 15th Section of which provides: "that in all suits regarding succession, inheritance, marriage and caste and all religious usages and institutions, the Mahomedan law with respect to Mahomedans, and the Hindu law with regard to Hindoos, are to be considered as the general rules by which the Judges are to form their decisions." Nothing is mentioned in this Regulation about cases of contract, evidence and other miscellaneous matters, though the statute of 1781, in general terms directs; "that all matters of contract and dealing should be determined in the case of Mahomedans by the laws and usages of Mahomedans," &c. see Section 7. The reason is that this enactment was only considered to refer to the King's Courts and was intended to exclude the introduction of the English Law in such cases even from the King's Court."[1] By the Regulation of 1793 matters of contract and so forth were consequently left to be decided as hitherto according to the general law and custom of the land,[2] yet such custom must not be contrary to natural justice.[3]

The revival of part of the Hindu Law re-enacted Reg. 4, 1793.

But in matters of contract, &c. no rule was laid down.

And these are to be decided according to Mahomedan Law and natural justice.

Exception.

In particular cases, where questions incidentally involving these topics, are interwoven with questions of inheritance and so forth,

Digitized by Google

it may be necessary to refer to the general principles of Hindu or Mahomedan Law.[4]

[1] Harington, I. 8. note 2.

[2] Yet see principles of Mahomedan Law, XVIII. where it is reported, that the Sudder was of opinion that no rule of Mahomedan Law can apply to a civil suit in which the parties are Hindoos; and Reg. 8, 1795, Sect. 3. Cl. 2, for *Benares* "in causes in which the plaintiff shall be of a different religious persuasion from the defendant, the decision is to be regulated by the law of the religion of the latter, excepting where Europeans or other persons not being either Mahomedans or Hindoos, shall be defendants, in which cases, the law of the plaintiff is to be made the rule of decision *in all plaints* and actions of a civil nature."

[3] This seems to be the meaning of the various expressions in the Regulation law that the case is to be decided according to justice, equity and good conscience. 5th July 1781. Sect. 60, 93. Reg. 6, 1793, Sect. 31, Reg. 2, 1803, Sect. 17, Reg. 7, 1832, Sect. 9, according to equity and good conscience Reg. 1, 1821, Sect. 4, Cl. 1, Sect. 12, Cl. 1, Reg. 7, 1828, Sect. 26; according to the principles of substantial justice, Reg. 13, 1816, Sect. 96, Reg. 7, 1828, Sect. 14.

[4] Princ. Hindu Law I. VIII. See also S. D. A. Rep. 2, 80, where the Sudder Dewanny inquiries if a *deed* in question is valid under the Hindu Law; 4, 339, a *lease* under Hindu Law; 4, 334, a conditional *sale* or gift under Mahomedan Law; 4, 86, a *sale of wine* by Brahmins under Hindu Law.

11. The English law has never been introduced into the country beyond the authority of the King's Courts, yet as questions respecting succession, inheritance and marriage are to be decided between the Hindoos according to Hindu Law and between Mahomedans according to Mahomedan Law, the same questions must between British subjects, be decided according to English law, and between other foreigners according to their laws, as far as the law is known and can be proved.[1]

The English Law never introduced;—but applicable in cases of inheritance, &c. between British subjects.

When the parties are of different persuasions as in cases between Shias and Soonees, between Mahomedans and Hindoos, between Christians and Mahomedans, the decision must be governed by the principles of justice, equity and good conscience, and neither the English nor any foreign law must be introduced Reg. 7, 1832, Sect. 9.[2]

When parties are of different persuasions, it is to be decided by natural law.

[1] French law, S. D. A. Rep. 5, 176. Portuguese, S. D. A. Rep. 2, 227 Armenian, ib. 3, 9.

[2] Consult; Sakina Khatun *vs.* Gour Sunker Shen. S. D. A. Rep. 5, 299. It was formerly enacted for Benares by Reg. 8, 1795. Sect. 3. Cl. 2, that in such cases the law of the *Defendant* was to be followed, *except* when *Defendants* were neither Mahomedans nor Hindoos, when the law of the Plaintiff was to be made the rule.

Digitized by Google

Regulation law.

12. According to a statute of 1797, (Section 8,) a regular code was to be formed for the Company's possessions in India, but all the former enactments had already been revised in 1793, and published in 48 different Regulations, and these Regulations were denominated the Bengal Code. This Code, together with the numerous annual addition of Regulations, refers, with few exceptions, only to revenue and administrative matters ; the greatest part of civil matters, is therefore still left to be decided according to general customs, based upon the Mahomedan law and natural law, (Sect. 10.) It is a mistake to consider the Regulation law as the *only* law of the country[1], a general view of the contents of the regulations and a reference to Act 1797, by which it was ordered, that all regulations affecting the *rights*, *persons* or *property* of the natives or others should be registered and formed into a regular code (Sect. 8) compared with Reg. 41, of 1793, especially Sect. 13, " that the Court shall follow regulations *thus* framed and enacted and no others—and Reg. 3, 1793, Sect. 11," that acts done by the officers of government employed in the collection of revenue in their official capacity in opposition to the Regulations are subjected to the decision of the Courts of Justice, and that even a special order originating with the Governor General in Council or the Board of Revenue may be subject to the decision of the Courts, shows, that the Regulation law was principally intended to prevent *arbitrary* government, (consult Sect. 7) and to regulate the rights and duties between the sovereign and the subject, *not* between man and man, except in very few cases. See Reg. 41, 1793, Sec. 2 : " every rule or order that may be passed by the Governor General in Council regarding the administration of justice ; the imposition or levying of taxes, or of duties on commerce ; the collection of the public revenue assessed upon the lands ; the rights and tenures of the proprietors and cultivators of the soil ; the provision of the Company's investment ; the manufacture of salt and opium ; and generally all regulations affecting in any respect the rights, persons or property of the natives or any individuals, who may be amenable to the provincial courts of judicature, shall be recorded in the judicial department, and there

Digitized by Google

framed into a regulation and printed and published as hereafter directed.

1 See also preamble to a draft for *consolidating* and *amending* the laws relative to trespass by cattle. Govt. Gaz. 1842, page 8. As the Regulation Law contains nothing about trespass by cattle, the draft must refer to the general law, and the common customs of the country, which were to be consolidated and amended. Cons. 5th Nov. (15th Oct.) 1841, (Govt. Gaz. 1842, page 142,) that there is *no law* which authorises the intervention of the Civil Court in the estate of a lunatic containing only personal property; consult Hedaya 2, 286. The Kazee (Civil Judge): "is appointed for the purpose of attending to the interests of all such as are unable to attend to their own concerns."

CHAPTER II.

On the Mahomedan Law.[1]

13. The basis of the Mahomedan Law, religious, civil and criminal, is the Koran, believed to be of divine origin and to have been revealed by an angel to Mahomed, collected by Aboo Beker, and promulgated in the 30th year of the Hejirah (year of Christ 652.[2]) Foundation of the Mahomedan Law. 1 The Koran.

2 Sale's Prel. Disc. to the Koran, Sect. 3.

14. As the ordinances of the Koran in Civil matters are few and imperfect, the rules of conduct (Ahadees, Soonnut, or Revayat) deduced from the oral precepts, actions and decisions of the prophet, form the second authority, conclusive in all cases not expressly determined by the words of the Koran. They were collected after his death by tradition from his companions, contemporaries and successors. 2 The Soonnut.

15. The schism, which took place after Mahomed's death among his followers, divided the Musselmans into two sects, the Soonees and the Shiites; each of them have their own collections of Ahadees, which they consider genuine and authoritative. The Soonees allow traditionary credit to the companions of the Prophet, his four immediate followers and some of his contemporaries, but the Shiites give credit only to Aly and his partisans, and to those sayings and actions which they believe to have been verified by any of the twelve Imams. Differently interpreted by the Soonees and the Shiites.

1 See Harington 1, 223. Hamilton Pref. to Hedaya.

Digitized by Google

Further legal authorities received by the Soonees;

16. If no rule of decision is found either in the Koran or Soonnut, the *Soonees* admit as a third source of legal authority the *concurrence of the companions of Mahomed;* and if this also fail, they allow the *validity of reason,* restricted by analogy, in applying by inference the general Principles of law and justice to the various transactions and circumstances of the changeful scene of human life, which, as they could not all be foreseen, it was impossible they could all be provided for.

who in Civil matters follow different authorities.

Though all the Soonees agree in matters of faith, they disagree in points of practical jurisprudence: some following one, some another of the four different great authorities. Imam Daood of Ispahan entirely rejected the exercise of reason, whilst Aboo Hunnefah (died 772,) was so much inclined to it, that he frequently preferred it to traditions of a single authority; and Malik, (died 801) Shafijee, (died 826,) and Ibn-i-Hunbul (died 863) seldom had recourse to analogical argument, when they could apply either a positive rule or a tradition.

Who is to be followed when the authorities differ.

17. The authority of Aboo Hunnefah and his two *disciples* Aboo Yoosuf (died 804,) and Imam Mahomed (died 901, or died 911,) is paramount in Bengal and Hindoostan. The opinions of the disciples are so much respected, that when they both dissent from their master, the Judge is at liberty to adopt either of the two opinions. If there is a difference between the two disciples, whichever agrees with Aboo Hunnefah must be preferred, and in all judicial matters the single opinion of Aboo Yoosuf is preferred to that of Imam Mahomed.

Works extant.

18. Aboo Hunnefah has not left any work on jurisprudence, but his doctrines are recorded and illustrated by his disciples, particularly Imam Mahomed in the Zahir-oo-ruwayat, and commented on by different persons, but neither the text nor the comments are known to be in existence, except an imperfect copy of one commentary. The oldest work on jurisprudence in existence is the Mokhtusur-ool-Kuduree, written in the 11th century in the Christian era.

The other books in actual use for expounding the Mahomedan law are of two descriptions. 1. The first consists of texts and comments, which in a scientific method state the elements and principles of the law; establish them by proofs and reasoning, and illus-

Digitized by Google

trate the application of them by select cases, real or supposed, such as the Hedayah ; Kunz oo' dukayik ; Vikayah ; Nikayah and Ashbat o' Nuzavir, with their respective commentaries. 2. The second description is commonly, but not always, distinguished by the title of Futwa, and is for the most part a collection of law cases arranged under proper heads with a short recital of facts and circumstances without arguments and with authorities only for the cases as quoted. The Futwa-i-kazee Khan written at the end of the 12th century, and the Futwa of Alumgeer, compiled in 1689, by order of Aurungzebe, (also called Alum-geer) are the most esteemed ; the last is universally received as an authority in this country.

19. The Hedaya or "the Guide" is the most celebrated of the law books. It is a commentary upon the Bidayut-ool-Moobtudee (an introduction to the study of law) by Sheik Boorhun-oo-deen Alee, who died in the year 1213. It contains a selection of law cases connected with the proofs and arguments by which they have been determined. Many commentaries have been written upon the Hedayah, but only four are extant in Bengal. For the instruction of the Courts, the Hedaya has been translated under the auspices of Government, into Persian and English.[1] The Hedaya.

1 The Hedayah by C. Hamilton 4 vols. 4to. London, 1791.

20. the Futwa-i-Alumgeree is four times the size of the Hedayah, and contains little more than a recital of law cases under 61 different heads without arguments and proofs, as they are stated in the Hedayah. This work is most useful for elementary instruction ; the other for practical use. The Futwa is valuable as the latest and most comprehensive compilation, but it was compiled by several persons of different judgment and unequal ability. The one is a most useful addition to the other. Futwa Alumgeree.

21. The law of inheritance is not contained in the Hedayah, but in a separate work, "the Furajid oo' Sujawundee," composed by Imam Sirajoodeen Mahmood ben-i-Abdoo Rusheed of Siijawund and commonly called *the Furaeez-i-Sirajeeyah.*[1] Forty commentaries have been written upon this treatise, the best of which is the *Shureefeea* by Shureef Alee ben-i-Mohummud (year 1426,) which is of the first authority and universally received.[2] The Sirajeeyah and Shureefeea.

Digitized by Google

1 The Sirajeeyah was translated into English by Sir W. Jones, 1792, (in his works, vol. 3, 505.)

2 See N. Bailie's Mahomedan Law of Inheritance, Calcutta, 1832, which contains many extracts from the Shureefeea.

CHAPTER III.

On the Hindu Law[1].

The contents of the Dhurma Shaster.

22. The general body of ceremonial and religious observances, of moral duties and of municipal law—the Dhurma Shaster in its most comprehensive sense—consists 1st, of *Smritis* (remembered law) or text books; 2ndly, of *Glosses* or commentaries on the text book; 3dly, of *Digests* comprehending either the whole system of jurisprudence, or only a particular part.

The Smritis.

23. Smritis, or the Dhurma Shaster, in a strict sense, have been promulgated, according to some by eighteen, according to others, by thirty-six or more sages.[1] Treatises attributed to these ancient philosophers are extant, though probably composed by other persons, who have affixed to their compositions the names of sacred personages as Menu, Yajnyawalcya, Vishnu, &c. but they are implicitly received by Hindoos as the authentic words of those personages.

1 The following list is according to Yajnyawalcya; Menu, Atri, Vishnu, Harita, Yajnyawalcya, Ushanas, Angiras, Yama, Apastamba, Sanverta, Catyayana, Vrihaspati, Parasara, Vyasa, Sancha and Lichita (who were brothers and wrote each a smriti separately and another jointly; the three being since considered as one work) Dacsha; Gautama; Satatapa, and Vasishta. Parasara, whose name appears in the above list enumerates also twenty select authors; but instead of Sanverta, Vrihaspat, and Vyasa, he gives the names of Casyapa, Bhrigu and Prachetas.

The Law of Menu.

24. The Law, or Institutes of Menu is assigned to the Krita or Sutyu Yuga, or first age;[1] the ordnances of Guatama to the Trita, or second age; Sancha and Lichita to the Dwapara, or third; and the ordinances of Parasara to the Kali, or fourth, the present sinful age. That part of Parasara which should contain his legal institutes is entirely wanting.

---

1 Strange I. pref. XI.—Colebrooke's Preface to Digest and to translation of Dhaya Bhaga.

Digitized by Google

1 Sir W. Jones in the preface to his translation of the Institutes of Menu (Calcutta, 1794,) VIII. fixes their age at the year 880 before Christ. The best commentators declare that the Institutes of Menu as well as of Yajnyawalcya are written by other persons than Menu and Yajnyawalcya; Colebrooke, Asiatic Researches, vol. 8. Galloway, 10.

25. The number of commentaries on the Smritis is very great. This is ascribed to the circumstance, that every succeeding dynasty in India, at its commencement, promulgated a new commentary of the ancient text book, as the rule of its government. Some of the most renowned are *the Mitacshara* by Vijnyaneswara, on the institutes of Yajnyawalcya; written between the 9th and 14th century.[1]

Commentaries.

The Mitacsharah.

1 A part of the Mitacshara *on inheritance* is translated by Colebrooke "in his two treatises;" Calcutta, 1810. Another *on judicial proceedings and evidence* by Sir F Macnaghten, in Consid. on Hindu Law, 405 seq, reprinted with additions: on witnesses, &c. in Princ. Hindu Law I. 131 seq.

26. The Digests are also numerous; the most renowned are the Daya Bhaga by Jimuta Vahana,[1] the Daya Crama Sangraha, by Shree Krishna Turcaluncara;[2] the Vivada Bhangarnava by Jugarnath Turcapunchanun.[3] The last, which is commonly known as Colebrooke's Digest of Hindu Law on contracts and successions, was compiled by Jugarnatha under the superintendence of Sir William Jones, but as the compiler unfortunately collected the discordant opinions maintained by the lawyers of the several schools, without distinguishing in an intelligible manner, which of them is the received doctrine of each school, but on the contrary left it uncertain whether any of the opinions stated by him do actually prevail, or which doctrine must now be considered in force, and which obsolete, this work is of very little use,[4] and has, not undeservedly, been characterised "as the best law book for a counsel, and the worst for a Judge."

Digests.

Colebrooke's Digest.

1 Translated by Colebrooke, two treatises on the Hindu Law of Inheritance, Calcutta, 1810.

2 Translated by Wynch, Calcutta, 1818.

3 Digest of Hindu Law, 4 vols. Calcutta, 1797.

4 See Colebrooke's Preface ii. to two treatises on the Hindu Law of Inheritance.

27. The Hindu law is very obscure in its application, for different reasons:

The Hindu Law obscure.

1st. The age of the various Smritis is often unknown and

2. Because the Smritis have

Digitized by Google

partly been abolished.

many of the precepts are generally aknowledged to have been long since abolished, and to be unfit for the present age. Thus the distinctions made in the case of partition and other places: "whether the son be virtuous or not; whether he be *learned* or not," are now abolished.[1] The Aditya Purana says: what was a duty in the first age must not in all cases be done in the fourth. Since in the Kali Yuga both men and women are addicted to sin. All agree that marriage between persons of unequal classes, and the filiation of any but a son legally begotton or given in adoption by his parents, has been abolished in the present age.[2]

It is the opinion of the southern jurists that text books are not of themselves authority, and that the only final authority must be sought in the various commentaries and digests, according to the school to which they belong.[3]

1 Digest 5, 396," at present, a third part is allotted to a son given without enquiring about his *good* or *bad* qualities." Con. Hindu. Law, 132.

2 Sir W. Jones's general note to the translation of Menu.

3 Strange, Preface XIII.

2. Because the moral and legal precepts are interwoven.

2nd. The *Dhurma Shastra* contains moral as well as legal precepts, and these are often so much interwoven, that it is difficult to distinguish them. For instance: in one place it is stated, that a father shall not give more to one son than to another without a sufficient cause; (Digest 5. 27) in another, that whatever distributions a father has made are binding, (Digest 5. 33). That the father shall not show an undue preference to any individual of his family, is a moral precept; but that a man is master of his own acquisitions, is a legal maxim; if a father therefore makes an unequal distribution without cause, it is legal, but sinful.

The expounders of the *Hindu Law* have considerably increased the difficulty created by the cause abovementioned, by an improper application of an argument of Jimuta Vahana, (Daya Bahaga, 2—30,)—which is not a quotation from a holy legislator,—to support a certain doctrine: " that a fact cannot be altered by a hundred texts." Some of these expounders destroy all distinction between legal and illegal acts and contracts in the manner in which they apply this quotation.

1 Princ. Hindu Law, VI.

Digitized by Google

3rdly. The law, whether it be *Sruti* or *Smriti*, direct revelation or tradition, has been differently interpreted. In the eastern parts of India, viz. Bengal and Behar, where the *Vedas* are less read, the dialectic Philosophy, or *Nyaya*, is generally followed in the interpretation of questions of Law, but in the southern parts, the Mimansa, a disquisition on proof and authority of Precepts, is followed.

3. Because the law is interpreted differently.

Hence two Principal sects or schools have arisen, which construe the same text variously, and deduce different inferences from the same maxims of law. These two schools are subdivided by further diversity of doctrine, so that there are now five distinct schools, which differ more or less from each other. The original *Smritis* are common to all, but each gives a preference to particular commentators and scholiasts.[1]

1 Colebrooke in Strange, I. 315.

28. These five schools may be termed the school of Bengal, of Benares, of Mithila, of the Dekkan, and of the Mahrattas,[1] according to the districts in which they are chiefly followed; yet if a Benares or Mithila family, having with them a Benares or Mithila Poorohit, and performing ceremonies agreeably to these respective schools, resides in another district, the doctrines of their own school are applicable in preference to the doctrine of the school of the district in which the family resides.[2]

There are five different schools.

1 Princ. Hindu Law, XX. Colebrooke in Strange, 318.

2 Gungadutt Sha, *vs.* Shreenarain Roy. S. D. A. Rep. 2, 11, consult 1, 43, Const. 1007, 10th June, 1836.

29. In Bengal the works chiefly followed are the *Dayabhaga* of Jimuta Vahana;[1] the *Dayatatwa* by Raghanundana; the *Vyavaharatatwa* by the same author; the *Subhodhini*; a commentary on the *Dayabhaga* by Sreekrishna Turcalancara; the commentary on the same by Acharjee Chintamoni; the *Daya Crama Sangraha* of Sree Krishna;[2] and the compilations termed the *Vyavastharnava*; the *Vivadarnavaseta* and the *Vivada bhangarnava*.[3]

1. Bengal School.

1 Translated by Colebrooke, Calcutta, 1810.

2 Translated by Wynch, Calcutta, 1818.

3 Commonly called Colebrooke's Digest of Hindu Law, translated in 4 vols. Calcutta, 1797

Digitized by Google

For particulars of these works, see Colebrooke's "two treatises" VI.

2. Benares school.

30. The school of Benares is followed in the middle of India. Preference is shown to the *Mitacshara of Vijynaneswara*, a commentary on the institutes of *Yajnyawalcya*,[1] and its commentary by Veereeshwara and Bhalam Bhatta, the *Veeramitrodaya* by Mitramissra, the *Parasara madhava* and the *Vyavahara madhava*.[2]

1 See Section 25, Note 1.

2. Princ. Hindu Law 1, 21. Colebrooke in Strange, 1, 317.

3. Mithila school.

31. The *Mithila school* is specially followed in the district of Puraniya (from 24° 34′, to 26° 35′,);[1] respect is chiefly paid to the following authorities, the *Vivada Chintamoni*; the *Vyavahara Chintamoni* by Vachaspati Misra; the *Vivada Ratnacara* by Chandeswara; the *Madana parijata* by Madanopadhya; the *Dwaitaparisistha* by Keshaba Misra; the *Smritisara*; and *Smritisamoochaya* by Hurrinath Opadhyaya, and the *Vivada Chandra* by Misroo Misra.[2]

1 Neither the *Mitacshara* nor the *Dhurma Shastra* mention the limits of Mithila, but custom has fixed its boundary to the Kusbah Januk poor, the footstool of the throne of Raja Januk, one of the Hindu Kings of former times.

2 Princ. Hindu Law, XXII. Colebrooke in Strange, 1, 318.

4. Deccan school.

32. The *Deccan school* is followed in the Madras Presidency; the chief authorities are: the *Mitacshara* the *Smriti Chandrica*; the *Madhaveeya* and the *Saraswati Vilasa*.[1]

1 Strange, I. XIV. 318. Princ. Hindu Law, XXII.

5. Mahratta school.

33. The *Mahratta school* is followed in the Bombay Presidency; the *Mitacshara*, the *Vyavahara Mayucha*, the *Nirnaya Sidhoo*, the *Hemadree*, the *Vyavahara Koustoobha* and the *Parasara Madhava* are authorities there.[1]

1 Princ. Hindu Law XXII. Colebrooke in Strange, 1, 318.

Law of adoption.

34. In questions relative to the law of adoption, the *Dattaca Mimansa* and the *Dattaca Chandrica* are equally respected alover India[1] and where they differ, the doctrine of the latter is adhered to in Bengal, and by the southern jurists, while the former is held to be the infallible guide in the provinces of Mithila and Benares.[2]

1 Translated by Sutherland, Calcutta, 1821.

2 Princ. Hindu Law XXI.

Digitized by Google

Mahomedan Law and Hindu Law expounded by Law officers.

35. The Mahomedan and the Hindu Law are respectively to be expounded by the appointed Mahomedan and Hindu Law Officers. Regulation 4, 1793, Section 15. Circular Order, 11th December 1840 (G. G. 1841, P. 15.) A statement of the facts on which the question of the law may arise is to be made out in writing, and signed by the Judge of the Court, and sent to the *Cauzy* or Pundit for his opinion, and the answer is to be written on the same paper or on one firmly annexed to it, signed and dated: if a further reference is deemed necessary, the Judge may apply for a further exposition from the law officers of the Sudder through the Registrar of the Court, which opinion he is bound to follow.[1] No reference can be made to individuals not acting in a public capacity, as no responsibility attaches to them, but opinions and authorities may be received from the parties, and if the Court deems it proper, referred to the appointed officers, or to the officers of the Sudder, to determine on their due weight and applicability to the case. Regulation 2, 1798, Section 4.

Not by private individuals.

1 This rule is not now strictly adhered to; the lower as well as the superior Courts often decide such cases without reference to their Pundits, when the point in question is well known and understood. See for instance S. D. A. Rep. vol. v. p. 82, 335.

CHAPTER IV.

On the Regulation Law.

The contents of the Regulation law.

1 The Regulations.

36. The Regulation law consists of: 1. the Regulations beginning in the year 1793, (Section 12,) and since annually continued. The enactments which had been previously[1] passed were re-enacted and amended in that year. The Regulations refer for the greatest part to administrative, and especially to revenue, matters, and the tenures created by the perpetual settlement. As far as these have no influence on civil matters, they have been left unaltered as they were prior to the Regulations, in every case in which they were not contrary to natural justice (Section 10.) Yet three important alterations have been made in the Civil Law by the Regulations.

1st. The Zemindars, as well those who were merely contractors for the revenue, as those who were real proprietors, have

indifferently been made landowners and declared to have proprietary right in the Zemindaree; and the cultivators, whether they were mere tenants or the real hereditary proprietors of the lands, have all indifferently been made tenants at will. Regulation 1, 1793, Section 9. By later Regulations some protection has been given to the real proprietors.

2ndly. The right of making testaments and appointing executors has been made general by Reg. 5, 1799, Sect. 6.

3dly. Slavery has been abolished; Regulation 5, 1843.

1 These are collected in Colebrooke's supplement to Digest of Regulations and Laws, Calcutta, 1807.

Regulations take effect from their promulgation.

37. A Regulation takes effect from its promulgation[1] or from the date fixed in the Act.[2] It is considered promulgated from the date of the receipt of the English copy thereof, Circular Order, No. 87, June 7th, 1833; and its publication in the Government Gazette is a proof of its existence; Reg. 10. 1835.[3]

1 The same is the rule of Acts of Parliament applicable to this country; see Sudder Dewanny Adawlut Rep. vol. iv. p. 225.

2 See for instance the Sale Act 12 of 1841, Sect. 35. "The Act shall have effect on and after the 1st January 1842."

3 There are several collections of the Regulations: see H. White: the Regulations and laws for the Presidency of Fort William, from 1793 to 1834, 8 vols. 4to. and the continuation. The Regulations of Government arranged on the plan of Mr. Molony's Synopsis and thus divided into volumes according to subjects, brought down to 1834, 8 vols.

A most useful and cheap Edition of the Regulations now in force is *J. C. Marshman's Guide to the Civil Law;* Serampore, 1842; which not only contains the Regulations, but the Constructions and Circular Orders; and *his Guide to the Revenue Regulations.* Serampore, 1835, 2 vols. containing only the Regulations.

2. The Constructions

38. *The Constructions.*—To secure a uniform construction of the existing Regulations, it was enacted by Reg. 10, 1796, Sect. 2, that the Zillah Judges and Magistrates were allowed to apply for the opinion of the superior Court whenever the sense of the Regulation from a difference of Construction or otherewise might appear doubtful and uncertain, and the opinion of the Sudder Dewanny Adawlut or Nizamut Adawlut was declared final and conclusive.

are binding on the Courts

To secure a uniform Construction for the Western as well as for the Lower Provinces, no construction is to be promulgated before it has received the sanction of both Courts. Government Resolution, 22d November, 1831.

when sanctioned by both Sudder Courts.

Digitized by Google

These Constructions are now collected and promulgated under public authority.[1]

1 Construction by the Court of Sudder Dewanny and Nizamut Adawlut of the Regulations and Laws for the Civil Government of the whole of the territories under the Presidency of Fort William in Bengal; vol. i. ii. Calcutta, 1833; vol. iii. (No. 1 and 3) No. 1123—1289). The later constructions may be found in the Bengalee Government Gazette.

3 The Circular Orders.

a. Of the Sudder Dewanny Adawlut.

39. *The Circular Orders.*—By Regulation 5th July, 1781, Sect. 9 and 61, the Dewanny Courts were empowered to make standing rules and orders, *and* rules of practice, to be approved by the Sudder and the Governor General in Council, so that the lower Courts should follow the order of the superior Court. This was amended by Reg. 10, 1796, Sect. 3, which empowered the Sudder Dewanny Adawlut to prescribe the *form* and *conduct* (rules of practice?) of the inferior Courts; but rules of practice are now to be submitted to the Governor General in Council, and, when approved, they are of the same force as a Regulation. Reg. 17, 1841, Sect. 2. These rules and orders, as well as other orders of the Government or the Court of Directors are published by Circulars.[1]

b. Of the Board of Revenue.

By Reg. 2, 1793, Sect. 4 and 8, Cl. 15, the Collectors were ordered to conform to all instructions with which they had been furnished by the Board of Revenue. These instructions and orders, as well as those from the Supreme Government in Revenue matters, have been published to the subordinate officers by Circulars. In these orders and instructions important civil principles are sometimes laid down, which, though they cannot have the force of law, except for those to whom they are directed, are still of importance as showing the principles upon which the Government acts.[2]

1 A new collection has lately been made: Circular Orders of the Sudder Dewanny Adawlut, vol. i. ii. Calcutta, 1828—1838, and vol. iii. Nos. 1, 2, to the 20th December 1839; the later Circular Orders are published in the Bengalee Government Gazette.

2 Circular Orders of the Sudder Board of Revenue at the Presidency of Fort William, including the Rules of Practice for the guidance of the Board and of the Commissioners of Revenue, together with a selection from the Circular and standing orders of the late Board of Revenue, by authority; Calcutta, 1838.

Digitized by Google

CHAPTER V.

Of Precedents and Customs.

Other sources of the existing law are precedents and Customs.

40 Besides the above Laws and Regulations (the written law) precedents and usages or customs are other sources of the Law of the land, of the greatest importance, and of scarcely less weight than the written laws and Regulations. Civil Society is not a mechanical machine formed and regulated by certain unchangeable and written Laws, but a moving and continually changing connection of individuals and families; the Laws and Regulations must change with the society which they are to regulate. Besides, it is impossible that the written law, however perfect and complete, could contain rules and directions for all human affairs; so far indeed is this from being necessary, that it would only be detrimental to the happiness of the people and prevent all moral and social improvement. As long as there does exist no necessity for an interference on account either of an uncertainty of the real customs, or of the existence of different and clashing usages, or of their immoral or detrimental nature, the Government need not and generally does not, interfere by making any enactment. The usages form themselves, alter and amend themselves as the state of things require. For instance, the relation between master and servant, and between workmen and their employer; bills of exchange, insurance and other mercantile contracts, are more or less regulated by custom. Custom will even sometimes abolish the written law; many prescriptions of the Hindu Law are now generally acknowledged to be antiquated, and of the eight forms of marriage, of which seven are acknowledged to be legal, only one (the Brahma) or perhaps two (the Brahma and the Asura) is ever used. The right of Koolin Brahmuns to marry as many wives as they please, is founded upon customs, *contrary* to the Hindu Law.

Validity of custom necessary.

Positive enactments not always necessary.

Customs may abolish written law.

Precedents how far valid.

41. The reason why decrees of the several Courts and especially those of the Sudder Courts are considered to be of the same force as the written law, is that they must be considered to contain a true exposition of the law of the land, having been laid down as such by the most learned and best informed persons; yet decrees

Digitized by Google

are in themselves not laws, but merely the application of the law to particular cases, and as the Judges are by their oath bound to decide each case upon its own merits in conformity with law and natural justice, they cannot be bound by a precedent, which they consider either unfounded or contrary to law and justice.[1] Precedents are always to be applied with great consideration and circumspection, because human affairs are so diversified, that whenever the decision of a case does not depend upon a single rule or principle, two cases will seldom be found perfectly equal.[2]

1 Compare the decree in the case of M. Koruna Mai *versus* Joy Chunder Ghose, and Kishen Lochun Bose *versus* Tareny Dassy, where it is decided that an *unbegotton* sister's son excludes the paternal uncle's son. S. D. A. Rep. vol. v. p. 42; v. 55, with the decree in the case of M. Luckee Prya *versus* Bhyrub Chunder Chowdry, vol. v. 315, where the unbegotten sister's son is properly excluded. (Sect. 110) Compare also Essan Chunder Raj *versus* Eshwor Chunder Raj. vol. i. p. 2, and Ram Koomar Neaee Bachosputty *versus* Kishen Kinkur Turkbhoosun, vol. ii. p. 42, where it is held, that a father may make an *unequal* division of his immoveable ancestorial property, with Bhowany Churun Banerjee *versus* the heirs of Ramkanto Banerjee, vol. ii. p. 242, where this right is correctly denied him. (Sect. 273,)

2 A selection of the decrees of the Sudder Dewanny Adawlut is made under authority. The latest edition of cases from 1791 to 1834, is published in five volumes, Calcutta, 1827—43.

42. The validity of custom is universally acknowledged;[1] not only the validity of general and local custom but even of family custom or customs observed, only by certain classes of individuals.[2] A person settling in a foreign district is not to be deprived of the benefit of the laws of his native district, provided he adhere to its customs and usages.[3]

Customs general, local and family.

1 Menu, Book viii. p. 41. "A king who knows the revealed law must inquire into the particular law of classes, the law or usages of districts, the custom of traders and the rules of certain families, and establish their peculiar laws, if *they be not repugnant* to the law of God." See also Book i. p. 108; iv. p. 155.

"The custom of the country is to be referred to and abided by." See the Reg. of the 11th April 1780, Sect. 23; of the 25th May 1781, Sect. 22; and of the 27th June 1787, Sect. 37; also Reg. 3, 1793, Sect. 15, and the case of Mohun Sing *versus* Chuman Roy, S. D. A. Rep. vol. i. p. 28, that of Mohamaya Debee *versus* Goureekanto Chowdry, vol. i. p. 236, and that of Narain Doss *versus* Brindabun Doss, vol. ii. p. 151. Consult vol. iii. p. 41. Note.

2 Preamble to Regulation 10, 1800, " that the custom in the Jungle Mehals of Midnapore and other districts by which the succession to landed Estates invariably devolves on a single heir, shall continue. See Ram Gunga Deo *versus* Doorgamoney Jobraj, S. D. A. Rep. vol. p. 270.

3 Gunga Dutt Jha *versus* Sreenarain Roy. S. D. A. Rep. vol. ii. p. 11. Consult vol. i. p. 43. Const. No. 1007, 22d April, (13th May) 1836. According to custom, a Kritima son may still be adopted in the *Mithila* province, and in *Orissa* a brother may be appointed to raise issue for the deceased; both are considered valid. S. D. A. Rep. vol. ii. p. 175. Note.

Requisites to make a custom valid.

43. To make a particular custom valid it is requisite:

1. That it has been used *so long* that the memory of men runs not to the contrary.[1]

2. That it has been *continued.* It ceases by any interruption, and the revival gives it a new beginning, which will be within the time of memory and make the custom void; but the interruption must be an interruption of *right*, not merely of possession. Thus, if there is a custom that a certain tank is used by all the inhabitants of a district, the custom is not destroyed, though some or all of them discontinue the use of it for sometime, but if the *right* is lost for a single day, the custom is abolished.

3. That it has been *peaceably acquiesced in*, not subject to continual contention and dispute, for the consent, which is the foundation of all customs, is then wanting.

4. That it is *reasonable* or rather taken negative that it is not irreasonable,[3] or contrary to law.[4]

1 Menu, B. i. p. 108, "immemorial custom is transcendent law." Consult p. 110 "thus have holy sages, well knowing the law is grounded on immemorial custom, embraced as the root of all piety, *good* usages *long* established."—Sumrun Sing *versus* Khedum Sing. S. D. A. Rep. vol. ii. p. 116.

2 Bemola Debee *versus* Gokoolnath. S. D. A. Rep. vol. i. p. 29.

3 Thus the custom, that an office was inheritable, is unreasonable, when the performance requires particular qualification; and that the perquisites were divisible without performing any part of the duties of the office is unreasonable, as the perquisites are payment for work done and performed. (Sect. 207.)

The custom among Koolins of marrying many wives, who are to be maintained by their father and his family, Dig. vol. v. p. 399, is unreasonable, and ought not to be considered valid.

4 Such as the collection of duties from gunges, hauts and bazars called "Sayer," which is contrary to Reg. 27, 1793, Reg. 6, 1811; salamees to landholders on marriages, abolished on the 15th August 1772, Sect. 13, and other Abwabs of Ryots and tenants now incorporated in the land rent. Reg. 2, 1795, Sect. 14, Cl. 7; Reg. 25, 1803, Sect. 27; Reg. 27, 1803, Sect. 53, Cl. 12, Acceptance of Nuzurs by public officers, C. O. B. of R. No. 27, 23rd June 1829.

Custom when to be proved.

44. If it be disputed whether a custom has yet been established or is in existence, it must be proved. Many customs are so well and commonly known that the Judges, especially, do not

Digitized by Google

require any proof of their existence and extent ; but when the custom is doubtful or unknown, it must be proved by the examination of the oldest and most respectable people, or by the declaration of certain public bodies, as the Chamber of Commerce, the Trade Association, &c. and it is the duty of the Court to decide, whether the facts stated are sufficient to establish a custom.[1] And how.

Thus, for instance, a Haut or a Gunge having long been held on a certain place or the owner of an Indigo factory having cultivated Indigo in a certain district, does not prevent a *new* Haut or Gunge being established near the old one (Circular Order of the Board of Revenue, 18th May, 1819, No. 47) or a *new* factory being established and Indigo cultivated in the same district, where the old is situated. C. O. B. of R. 5th March, 1830, No. 64.

1 S. D. A. Rep. vol. v. p. 6 ; 199.

Digitized by Google

BOOK II.

ON INHERITANCE.

CHAPTER I.

On Succession to Property in General.

Duties of the ruling power with respect to property of deceased persons according to Mahomedan Law.

45. It is distinctly laid down in the Mahomedan Law, that it is the duty of the Civil Judge (the Kazee) to watch the interest of those who, either on account of their age, natural infirmities or absence are unable to manage their own affairs.[1] The Judge was therefore bound to see the property of a deceased person applied according to the will of the deceased and the rules of inheritance; and to exert a general superintendence over all such property until it had been taken possession of by the persons entitled thereto, or applied according to law.[2]

[1] Sirajyah. Hedaya, B. iv. p. 550; see also Menu, Dig. vol. v. p. 449, "the king should guard the property of an infant."

[2] Bailie, 112.

Altered by Reg. 5, 1799, Heir or executor can take possession without application to the Court.

46. This superintendence was abolished by Reg. 5, 1799, (Ced and Conq. Prov. Reg. 3, 1803, Sect. 16.) The appointed executor, the heir or heirs, or in case of a minor, the legal guardian, was declared competent to take possession of the Estate of a deceased person without any application to the Civill Court, and the Courts were forbidden to interfere[1] except on *a regular complaint* against the executor or possessor of the Estate, unless the heir was a disqualified landholder subject to the superintendence of the Court of Wards. Sect. 2—4.

In case of disputed succession.

Even when the right of succession was disputed by different claimants, the institution of a regular suit was required before the Zillah or City Judge[2] could interfere, but on the institution of the suit he was instantly to take good security from the party in

Digitized by Google

possession, or in default of such security to give possession until the suit might be determined in favor of the other party, if he could give security; and if none of the parties could give sufficient security, to take charge of the Estate. If the Estate contained landed property the Judge was, by a precept to the Collector of the district where the Estate might be situated, to order the Estate to be attached, or an administrator to be appointed. Sect. 4, 5. Reg. 5, 1827, Sect. 3.

Security taken, but succession decided by a regular suit.

1 See Sudder Dewanny Adawlut Reports, vol. ii. p. 307.

2 The Revenue officers have no authority in these cases they are by Reg. 8, 1800, Sect. 21, Reg. 42, 1803, Sect. 41. only empowered,—on receiving notice of any person having succeeded by inheritance to the property of a Malgoozaree Estate or Lakhiraj tenure, to institute such inquiry as should appear necessary to ascertain the truth of the alleged succession, and to cause the nesecessary entries in the Register.—Const. No. 1008, 17th June, (19th May,) 1836, Sect. 4.

47. As Estates under these rules were often taken possession of upon pretended claims of right, by gift or succession, to the total or partial destruction of the rights of the legal heir—Reg. 19 of 1841, provided:

Security insufficient. Court empowered *summarily* to *decide* right of possession.

1st. That not only the person claiming a right as heir to the whole or any portion of the Estate, but even and agent, relative or near friend[1] on his behalf, or the Court of Wards, in cases within their cognizance, might apply, to the Court for assistance, either after actual possession has been taken by another person, or when forcible means of taking possession were apprehended. Sects. 1, 2.

2nd. That if this application is made within six months after the decease of the proprietor whose property is claimed by right of succession, Sect. 14, and the Judge by examination of the complainant, witnesses or documents, is satisfied that there are strong reasons for believing that the party in possession has no lawful title, or that the claimant has and his likely to be materially prejudiced if left to the ordinary remedy of a regular suit, and that the application is made bonâ fide, Sect. 3, then the Judge is empowered:

Provided.

1. To appoint an officer to take an inventory of the effect, and seal or otherwise secure them, or if there seems to be danger of the misappropriation of the property, to appoint one or more Curators to take charge of the Estate. Sect. 4, 5.

Inventory taken, or Curator appointed.

2. To summon the party complained of and give notice of

and parties summoned.

Digitized by Google

vacant or disturbed possession by publication, and, after the expiration of a reasonable time, to determine summarily and finally the right of possession, subject to a final decision by a regular suit. Sect. 4, 18.

1 The natural mother of an adopted son may apply as next friend, Sudder Dewanny Adawlut Rep. vol. v. p. 50.

Court not bound to take security.

48. The Judge is not as formerly bound to allow the party in possession to continue in possession; this is left to his discretion, and is not to be allowed when the party out of possession seems to be the lawful owner and might therby be exposed to considerable risk, Reg. 19, 1841, Sect. 6; but if the deceased proprietor has given *legal* directions regarding the possession of his property after his decease, in the event of minority or otherwise, such directions must be followed, Sect. 15, or if the property is under the management of the Court of Wards, the Court will continue in possession until the claimant's right has been decided by a regular suit Sect. 16.

but to follow legal directions of the deceased

When the estate contains landed property Court to call for the report of the Collector.

49. When the Estate contains land paying revenue to Government, the Judge is in all matters regarding the propriety of citing the party in possession, of appointing a Curator and of nominating individuals to that appointment, to demand a report from the Collector. In cases of urgency the Judge may proceed, in the first instance, without such report, and he is not obliged to act in conformity thereto, but then he is instantly to forward a statement of his reasons to the Sudder for their approval. Reg. 19, 1841, Sect. 8.

When a Curator has already been appointed by another Judge.

50. Should a Curator have been already appointed in another district within the presidency *for the whole Estate*, no other Curator can be appointed, but if the appointment is only for a portion of the Estate, another Curator may be appointed for the residue of the Estate, or any part thereof, unlesss the property is already subject to a summary suit before another Judge. When two or more Curators are appointed by different Judges for several parts of an Estate, the Sudder may appoint one Curator for the whole Estate. Reg. 19, 1841, Sect. 13.

When claimant is absent, Court to take charge of the estate.

51. When there is no heir or executor on the spot, the Judge is to take charge of the Estate[1] Reg. 5, 1799, Sect. 7, and if necessary appoint an administrator, Sect. 5, and issue an advertisement in the current language, requiring the heir or any other

Digitized by Google

person entitled to receive charge of the Estate to appear within a twelve month. The advertisement is to be published: 1, on the spot where the property was found, or is situated, 2, at the Dewanny Adawlut Cutcherry of the Zillah or City; and, 3, if ascertainable, at the dwelling place of the deceased, or, if the deceased were a European, in the Calcutta Gazette. and advertise.

1 If such property should come into the hands of the Magistrate, he is to forward it to the Judge. C. O. 15 Dec. (1st Dec.) 1837, 3.

52. If a person appears and satisfies the Judge that he is entitled to the property, or to receive charge thereof as executor or the like, the property is delivered up to him on his paying the expenses which have been incurred.

If a claimant appears within a year, the property to be delivered up.

Should no claim be preferred within a year, a report with an inventory is to be transmitted to the Governor General in Council for his orders. Reg. 5, 1799, Sect 7.

If none appear, report to be made to the G. G. in C.

53. The duties of the Judge with respect to such Estates are restricted *to the preservation* of the property. He is to do every act necessary for this purpose, but nothing else. He is not to act as administrator, nor to pay debts,[1] or collect outstanding claims. If therefore the Estate consists of things, which can be preserved, he is only to preserve them, but if they would be destroyed or considerably deteriorated by being kept for a year, he must cause them to be sold. Bonds and other outstanding claims, he is not to demand payment of, but a Hoondee must be presented for payment, when due, as the failure to present, would involve a risk of loss.[2]

The duties of the Judge regarding the estates of absentees, 1. in general.

1 But the creditor can of course bring his action against the Estate and enforce payment according to the decree.

2 Const. No. 541, 19th March 1830. No. 1286, 14th Aug. (4th Sept.) 1840.

54. When the deceased is a British European subject,[1] it is the duty of the Civil Judge to see the Estate legally administered to. He is therefore without delay to take charge of the property, although there may be a claimant, a near relation, or respectable friend on the spot, and, if a will is found, to deliver over the Estate to the person who may obtain probate thereon; and if no will is found, to report the circumstance without delay to the Register of the Supreme Court of Judicature and to deliver over the Estate to the person obtaining Letters of administration from the Supreme Court.[2]

2 Of British European subjects.

Digitized by Google

1 The son of a British subject, though his mother was a Native Christian is a British subject. S. D. A. Rep. vol. ii. P. 229, see also T. Hoo *versus* P. Marquis, *ib.* vol. iv. p. 243. Illegitimate children are considered to be of the same country as their mother. Const. No. 806, 26th July, 1833.

2 Reg. 15, 1806, Sec. 6. Const. No 983, 13th Nov. (16th. Oct.) 1835.

CHAPTER II.

On Executors, Administrators and Curators of Estates.

Who can appoint Executor.

55. An Executor is he to whom another man commits by will the execution of his last will and testament. Executors are as unknown to the Hindu Law, as a will or a legacy ;[1] the property of a deceased person, on his decease, instantly devolves on his legal heirs and the nearest of kin becomes the guardian of any absent or minor heir. But according to the Mahomedan Law,[2] and English Law,[3] every person—male or female—who can make a will, (Sections 294-6) can appoint one or more executors for the administration of his whole estate,[4] and this power is extended to every person subject to the Jurisdiction of the Civil Court, whether he be Hindu, Mussulman or Christian, by Reg. 5, 1799, Sect. 2, consult Reg. 19, 1841, Sect. 15.

1 Strange, vol. ii. p. 254. Prince. H. L. vol. i. 2, 3.

2 Hedaya, vol. iv. p. 544. Serajiyyah.

3 2. Blackstone's Com. 503.

4 Bailie, 5.

Who can be appointed executor.

56. Every person equal to the discharge of his duties can be an executor.[1] An infant may be appointed, but as he cannot act before he comes of age, an administrator will be substituted until that time. A married woman may also be an executrix. Under the Mahomedan Law, the husband's consent is not requisite, nor does he act for her,[2] but under the Hindu Law and English Law a married woman cannot, on account of her dependence on her husband during marriage, act without his consent and concurrence. If she be an infant, and her husband be of age he may act for her.[3]

1 According to Mahomedan Law, if a person of another religion was appointed executor, the will was not invalidated, but it was incumbent on the Civil Court to appoint another. Hedaya, vol. iv. p. 541, but this has been abolished, a Hindoo or a Christian may legally be the executor of a Mahomedan, and vice versa. S. D. A. Rep. vol. iv. p. 55; 303.

Digitized by Google

2 Hedaya, vol. iv. p. 542.

3 Blackstone's Com. 503. Toller, 34.

57. Whenever the deceased has appointed one or more executors capable of acting, such person is entitled[1] to take charge of the Estate without any application to the Court,[2] and to manage it in preference to any relative or heir,[3] except the heir is a disqualified land-holder, when the Court of Wards may appoint a manager of the Estate during the period of disqualification, if the Court thinks it necessary or expedient. 4 But an executor of a British subject cannot act before he has obtained Probate, (Sect. 54,) to obtain which he must apply to the Supreme Court; and 1st, prove the will; 2nd, take his oath that he will apply the goods according to law; and 3rd, file an inventory in the Court within a certain time. He is not generally bound to give security.[5]

An appointed executor may take charge of the estate.

Exception.

1 He is not of course obliged to act, unless he should have given a promise to that effect to the testator. Hedaya, vol. iv. p. 589.

2 Reg. 5, 1799, Sect. 2. The appointed executor becomes virtually so by acting in conformity with the appointment, see Hedaya, vol. iv. p. 540. S. D. A. Rep. vol. v. p. 198.

3 Hedaya, vol. iv. p. 542,554. S. D. A. Rep. vol. iii. p. 49.

4 Reg. 10, 1793, Sect. 1. Reg. 7, 1799, Sect. 26. Reg. 6, 1822. Sect. 4.

5 Toller, 247. Lovelass, 190.

58. If two or more executors have been appointed separately, one of them may act without the concurrence of the other, and he becomes then solely responsible; but if all the appointed executors are inclined to act, or if they have been appointed jointly, one of them cannot lawfully act without the concurrence of the other, unless 1st, the act requires immediate execution, as, disbursing funeral charges, paying for the maintenance of the children of the testator, &c., or 2dly, is of an incumbent nature, as, returning a deposit, which is no exercise of power but the performance of a duty, or 3rdly, does not require any deliberation, as, emancipating a slave, paying a legacy according to the directions of the testator; or 4thly, is evidently for the benefit of the Estate, as receiving a gift.[1] Whether executors are appointed separately or jointly must depend upon the expressions of the appointment; if it is not clear that they are to act jointly, it seems proper to

If two executors are appointed separately.

Or jointly.

Digitized by Google

consider the appointment as separate; because that they are to act jointly is a restriction, which must be proved.

1 Hedaya, vol. iv. 544. Either of them is said to be empowered to institute a suit, because it is impossible that both can plead at once; but this argument holds good only with respect to verbal pleading; written proceedings must be made jointly, as it is an act which requires deliberation.

If one of two executors die.

59. Upon the death of one of two separate executors, the right to act is in the survivor; but upon the death of one of *two joint executors*, the survivor is not entitled to act alone, because if the testator had been content with the discretion of one person in the management of his affairs, he would not have committed it to two.[1] If the deceased proprietor has left any directions for this case, this direction is to be followed; but if not, the direction of the deceased executor will be in force. If no directions exist, the Civil Court is to appoint a person in the room of the deceased executor.

Executor of executors.

When a sole executor dies having appointed an executor to his own will, the person so appointed becomes also the executor of the original testator.[2]

1 Hedaya, vol. iv. 544. Bailie, II.

2 Bailie, II. 2 Blackstone's Com. 506.

Duties of executors.

60. The duties of an executor are to see the will of the deceased executed to the best of his abilities; they are consequently various and differ according to the tenor of the will. The will is the power of the executor; whatever is done in conformity with the words or the spirit of the will, not of course being in any way contrary to natural or positive laws, is legal and valid; whatever is done inconsistent with the intentions of the deceased and contrary to another person's right, is illegal and invalid, and subjects the executor to responsibility. His duties are generally to see the deceased decently buried, to make an inventory of the Estate, to pay the debts of the deceased, collect his dues, pay off legacies, and deliver the residue to his heirs; but they may also manage the Estate for years for a specific purpose, or for a definite time as for instance until the legatees or heirs come of age, or are married.

Funeral, debts and dues.

61. The duties of executors and the duties of heirs with respect to the funeral of the deceased, his debts and dues, are the

Digitized by Google

same. (Sect. 243.) If the Estate is insolvent, all legacies become of course void, and so do all gifts upon deathbed. (Sect. 310.) According to English Law an executor is allowed to pay himself first among debts of equal drgree,[1] (Sect. 246,) which must be a general rule, as an executor under the Mahomedan Law and Hindu Law can pay the debtors as they come forward, to the exclusion of those who appear afterwards, if the Estate should be found insolvent. (Sect. 248.)

Legacies void if estate is insolvent.

Executor can pay himself first.

1 2 Blackstone's Com. 511.

62. As debts are to be paid before legacies, and previous to any distribution among the heirs, and as no means are provided by law for forcing the creditors to appear, an executor should allow a reasonable time to expire before making any distribution to the legatees or heirs, otherwise he will make himself answerable. He cannot in the mean time oblige the creditors to wait, as they are entitled to and may enforce payment at any time as long as there are assets. (Sect. 248.)

Legacies are not to be paid before a reasonable time after the death of testator.

63. To give the creditors time to come in, the English Law (22 & 23. Car. 2, 10) directs that executors are not to pay, except on their own risk, creditors and legatees before a year after the testator's death. (See Sect. 248.) If the creditors or legatees are not paid at the expiration of the year, they are entitled to interest. A creditor holding a bond *with interest*, is of course entitled to interest during the year, but all other creditors and legatees are not entitled to interest, whether the funds from which they are to be paid were productive or barren.[1] Thus, if a landed estate or 10,000 Rupees in certain 5 per cent. Government Promissory Notes were bequeathed, the legatee cannot claim the estate or the Notes till a year after the death of the testator, and the profits of the estate, or the interest of the Promissory Notes during that year will not come to the legatee, but go to the general estate of the testator.

According to English Law, not before a year after the death of testator;

after that time it carries interest.

To the above rule there are some exceptions:[2]

Exceptions to the general rule.

1. Annuities will commence immediately from the testator's death, but the first payment will not be made before the expiration of a year after that event.

2. A legacy payable on a certain furture day, for instance, when

Digitized by Google

the legatee becomes of age, when she marries, &c. will first bear interest from that time.

3. A legacy to a child[3] of the testator will bear interest from his death, if no separate provision is made for its maintenance.

1 Toller, 324. Lovelass, 203; yet see 209.

2 Toller, 325.

3 Whether this rule extends to illegitimate children is question; Toller, 326.

Legacy how to be paid.

64. A legacy should be paid in conformity with the testator's directions. If a specific property burdened with any personal incumbrance is left as a legacy, and the will contains no direction regarding such incumbrance, the property shall be relieved from the general estate and delivered unburdened to the legatee.[1] Thus, if the thing bequeathed was mortgaged, the sum due shall be paid as any other debt, and when released, the thing shall be delivered to the legatee, even if other legatees should suffer, because though that thing has been given as security for the debt, the sum due is still the debt of the deceased, due by him, and as such payable from his estate in general, and as the thing has been bequeathed without any clause, as to the payment of the debt, there does not exist any legal ground, why the debt should be thrown upon the legatee.

Personal incumbrances should be paid from the general estate.

But *real* incumbrances follow the property.

It is otherwise with *real* incumbrances, they follow the owner whoever he may be, if not otherwise directed. Thus, if an estate is bequeathed, the legatee is to pay the annual Jumma to the Government or the landlord, and cannot demand that the property shall be relieved by the general estate from the rent, and delivered to him rentfree.

1 2 Blackstone's Com. 512.

Legacy to be paid to whom.

65. A legacy should generally be paid to the legatee or his agent, and to no other. A legacy *to a minor* should be paid to his legal guardian,[1] but the executors of father, grand-father, mother, brother or paternal uncle become, under the Mahomedan Law, the guardians of the minor children or absent heir for such legacy.[2] The executor himself is not empowered to distribute the estate among the heirs and keep the legacy for the minor, as he is not appointed on behalf of the legatees, but on behalf of the *heirs*; the legacy should therefore either remain unpaid, so that the legatee continues to have his claim upon the estate or the heirs;

Legacy to a minor. Under the Mahomedan Law and Hindu Law.

Digitized by Google

or it should be deposited in the Court. In case the executor should keep the legacy in his hands, the heirs will still be responsible, if the legacy should perish, as the legacy was a debt on the estate.[3]

It is otherwise under the English law. An executor is considered to represent the deceased, and a legacy to a minor is therefore to be kept by him, and is not to be paid before the minor comes of age. Payment to the father or guardian is illegal. Not even the interest of the legacy is to be paid to the father for the maintenance or education of the minor, as he is bound to maintain and educate his own child, but *the Court* may in cases of necessity allow not only the interest to be applied to that purpose, but even in urgent cases break in upon the principal.[4]

under English Law.

1 Hedaya, vol. iv. p. 552.
2 Hedaya, vol. iv. p. 542, 554. Bailie, 5, 8.
3 Hedaya, vol. iv. p. 549.
4 Toller, 313, 327. Lovelass, 210.

66. The above rules are also applicable to an absent legatee. Under the Mahomedan Law the executor is not empowered to keep the legacy for him, but is either to let it remain unpaid as a claim upon the heirs, or deposit it in the Court,[1] but as he is appointed on behalf of the heirs, he is entitled to keep the share of an absent heir in his own hands.[2]

To an absent legatee.

Under the Englih Law the executor is to keep the legacy of an absent legatee until his arrival.[3]

1 Hedaya, vol. iv. p. 549. Princ. Mahomedan Law, 53.
2 Hedaya, vol. iv. p. 548.
3 Toller, 316.

67. A legacy to a married woman should, under the Mahomedan Law, be paid to the woman herself, as she is absolute owner of her own wealth.[1] Under the Hindu Law it should be paid to the woman herself *with* the concurrence of her husband, as she is the owner of her peculiar property, but subject to his control.[2] Under the English Law however, it must be paid to the husband, and *not* to the woman herself, as her legal existence is considered to be suspended by marriage, even though she should live seperate from her husband with no maintenance; but where the husband has made no provision for his wife, and the legacy amounts to at

To a married woman.

Digitized by Google

least 2,000 Rupees, the executor is not bound to pay the legacy unless the husband makes an adequate settlement on her.[3]

1 Prince. Mahomedan Law, 154, 254. Choitun Chowdry *versus* Beer Sing Matoon, S. D. A. Rep. vol. iv. p. 259.

2 Prince Hindu Law, vol. i. p. 40.

3 Toller, 321.

Executor may sell moveable and immoveable property.

68. An executor is empowered to sell property belonging to the estate, moveable as well as immoveable; and whether necessary for the payment of debts and legacies or not, the sale is still valid, but the executor is of course responsible, if the property has been sold without any good reason and to the detriment of those concerened.[1]

The same rule seems now[2] to be applicable also to executors and administrators of British subjects. By the 9th George IV. Chapter 33, 2, a sale by them of *real* property *for the payment of debts* has been declared lawful, and as the purchaser cannot know whether the property was sold for the payment of debts, or not, it is equitable that the sale should be upheld when the purchaser has bought the property in good faith.

1 Bailie, 8. Futawa Alumgeree: an executor sold land to pay a debt of the deceased with its price, having property in his hands sufficient to the discharge of the debts: this sale was lawful. Hedaya, vol. iv. p. 553. See also Nundkumar Roy *versus* Ranee Hary Priya S. D. A. Rep vol. v. p. 233, that a sale of lands by order of the Court of Wards is valid; if unnecessarily sold, the sale is still legal, but the Court is responsible for all losses.

2 Under the English Law an executor and administrator has charge only of the personal estate of the deceased, (Sect. 224, 323), and lands can never be sold for the payment of debt unless the personal estate be totally exhausted. A sale by an administrator of real property, *the estate being* solvent, was declared invalid though the sale was for the benefit of the estate, see T. Hoo *versus* Peter Marquis (1827), S. D. A. Rep. vol. iv. p. 243, but the 9th George IV. Chapter 33 (1828) has abolished the English distinction between real and personal estate *in this respect*, so as to make both equally assets for the payment of debts.

When his duties cease.

69. When the executor has paid the debts and the legacies, specific and general, he will pay the residue to the residuary legatee, or distribute it among the heirs according at law, and having thus fulfilled his trust, his executorship ceases.

Complaints against executors.

70. It is the duty of the executor to fulfil his trust without any unnecessary delay, and he is not to keep the property in his hands for his own benefit, but the Civil Court does not exercise any

Digitized by Google

superintendence. Executors are neither bound to file any inventory of the Estate, nor an annual account, in the Court; but those concerned or their nearest relatives or friends[1] are left to institute a regular complaint[2] in the Court against the executors, if they consider themselves in any way injured, and the Court is then to order the executors to explain and prove that the will of the deceased has been carried into effect; if the executors are proved to be unfit or to have been guilty of any misbehaviour, they are either reproved or another person is appointed to act jointly with them.[3] An executor of a British subject must file an inventory in the Court (Section 57,) and also a true account whenever the Court may order it.[4]

1 Reg. 19, 1841, Sect. 3.

2 Reg. 19, 1841 does not extend to this kind of complaints; the executor can neither be removed, nor ordered to do, or not to do any thing, without a full and regular investigation.

3 Hedayah, vol. iv. p. 540, 542.

4 Lovelass, 61, 190.

71. Executors are not entitled to any remuneration for their trouble, as it is optional with them to accept the appointment or not,[1] except the testator has fixed a remuneration in his will, or the trust has been accepted by a professional person in the way of business, for instance, by a banker or general agent, who is entitled to the common commission for such business; but all real charges and remuneration for extra work such as making up intricate accounts; pleading cases; carrying on extensive correspondence, and so forth, are to be debited to the Estate; even though this work should have been performed by the executor himself, he is entitled to a remuneration.

Executors not entitled to remuneration.

Exception.

But to debit all charges.

1 Lovelass, 62.

72. When the heirs of a person dying intestate cannot agree amongst themselves in the appointment of a common manager, (Serberakar) or the testator makes a will without appointing an executor;[1] or when the executor named refuses to act, the Civil Judge is, on application, to appoint a person to manage the estate for the several heirs, or to execute the will of the deceased. This person is called an administrator. Reg. 5, 1799, Sect. 4, 5. Ced. and Conq. Prov. Reg. 3, 1803, Sect. 16, Cl. 4, 5.

Administrator, when appointed.

By whom.

Digitized by Google

When the estate contains landed property.

If the Estate contains landed property paying revenue to Government, the Judge is to issue a precept to the Collector to hold the Estate in attachment, and to appoint a person as manager; Reg. 5,1827, Sect. 3; and if the heir or *all* the heirs are disqualified landholders, the Court of Wards may at any time without any application from those interested assume charge of the Estate and appoint a manager[2] for the same. Reg. 10, 1793, Sect. 2. Ced. Prov. Reg. 52, 1803, Sect. 10. Reg. 6, 1822, Sect. 4.

The heirs of a British subject dying intestate cannot take possession of the estate, even if they agree, (Section 55,) but the widow or next of kin must apply to the Supreme Court for letters of administration.

1 Should the deceased have left a father or grand-father, he or his executor may act as executor of the deceased without any appointment. Princ. Mahomedan Law, 55.

2 A European British subject is not to be appointed a manager of estates belonging to natives, Circular Order, 5th Nov. 1830 but is not this order superseded by Reg. 11, 1836, by which European British subjects became subject to the jurisdiction of the local Courts?

Requisites for being appointed administrator.

73. Administrators then are appointed either by the Zillah or City Court, or by the Collector ; the appointment is esteemed a public office, and capacity for business, goodness of character, and sufficient responsibility are particularly to be considered. Neither the recommendation of the heirs or of those interested, nor relationship, nor interest in the Estate, will entitle a person to become administrator. Reg. 7, 1799, Sec 12. Reg. 52, 1803, Sect. 12.

It is otherwise under the English law ; the widow, the husband, or the next of kin is by it *entitled* to become administrator on entering into a bond with two sureties in a penal sum double the amount of the effects sworn to—22 & 23, Car. 2. Sect. 10.

Administrator is to give security.

74. Before an administrator enters upon the execution of his office he is to give good security for the faithful discharge of his trust *in a sum proportionate to the extent thereof.* He is also to file an inventory of the Estate, and to give annual accounts to the Court for its inspection and examination. He is entitled to an annual allowance which is to be a per centage of the proceeds of the estate fixed by the Court. Reg. 7, 1799, Sect. 5, 6.

Is entitled to a remuneration.

Under the English Law, administrators are not entitled to any remuneration, it being considered a trust.

Digitized by Google

75. The duties of administrators and of executors are generally the same, only the executor distributes according to the will while the administrator, having paid the debt, distributes the remainder among the heirs according to Law. Appointed for a special purpose, their duties and powers must be inferred from their appointment—the Sunnud of the Court. Duties of Administrators.

76. Curators are public officers appointed either by the Supreme Government, (Reg. 19, 1841, Sect. 19,) or, in default of such public Curator, by the Zillah or City Judge, or according to his order by the Collector, (ib. Section 5,) to take charge of and manage Estates claimed by different parties until the right of possession has been summarily decided by the Court, (Section 47) or until an inventory has been taken, or security given, by the party in possession. (Reg. 19, 1841, Sect. 6.) Curator what. Who appoints. For what period.

77. When an Estate contains landed property paying revenue to Government, the Judge, before nominating a Curator, is to take the opinion of the Collector as to the fitness, respectability and trustworthiness of the person he intends to appoint, Reg. 19, 1841, Sect. 8, Cl. 2, Reg. 52, 1803, Sect. 12, and either before investing the Curator with the power of his office, or as soon as practicable after investing him, to take security from him for the faithful discharge of his trust and for rendering satisfactory accounts, Reg. 19, 1841, Sect. 7. How appointed when the estate contains landed property paying Revenue to Government. Security to be taken.

78. The powers of the Curator depend upon the nature of his trust and more particularly upon the Sunnud of the Court containing his appointment. In general they consist in taking care of and managing the Estate entrusted to him; to collect debts and rents an express authority in the Sunnud is requisite; Reg. 19, 1841, Sect. 3; and in the institution and defence of suits he is subject to the orders of the Judge; ib. Any surplus realized is without delay to be paid into Court and invested in public securities. Reg. 19, 1841, Sect. 7. Powers and duties of curator.

The Curator cannot of course sell any part of the Estate, even for the payment of debts, without a special order of the Court; nor can he grant any allowance for maintenance to those who may be entitled to a share of the Estate; such allowances can only be granted by the Judge, who at his discretion may demand se- Cannot sell part of the estate or grant allowances.

curity for the repayment thereof, with interest, in case the party should, upon the adjudication of the summary suit, appear not to be entitled thereto. Reg. 19, 1841, Sect. 10.

He must file an account.

The Curator is to file a monthly and quarterly account in abstract, and upon giving up the possession of the property, a detailed account; these are to be examined by the Judge, Reg. 19, 1841, Sect. 11, and to be open to the inspection of all interested. Sect. 12.

Is entiled to remuneration; and subject to fine for neglect, &c.

79. As a remuneration for his trouble the Curator is entitled to a reasonable payment, to be fixed by the Judge, and not to exceed 5 per cent. on the personal property and on the annual profits of the real property, Reg. 19, 1841, Sect. 7; but if the accounts are not regularly filed, or if they are erroneous, incomplete or not produced whenever called for, the Curator is liable to a fine not exceeding 1,000 Rupees. Reg. 19, 1841, Sect. 12.

CHAPTER III.

On the Right of Inheritance in general.

The right of inheritance depends upon positive laws.

80. The right of inheritance is not a natural right but a right established by positive laws. A son has no greater right to take the property which belonged to his deceased father than every other individual, and much less has the eldest son any right to take the property in preference to his other brothers, or the sons in general in preference to their sisters or their mother. Every nation has therefore its own law of inheritance. Generally, the right of inheritance depends upon the nature of kindred and on wedlock; but the laws differ by admitting different individuals or admitting them in a different order, or dividing the inheritance in different shares. A daughter, for instance, takes under the Mahomedan Law, a half share of a son when the deceased has left sons and daughters; but under the Hindu Law she takes only in default of sons, grandsons and widows; and under the English Law she takes an equal share with her brother of *personal* property. Again, when a person leaves sons and sons of a deceased son, the latter, take under the Hindu Law and English Law with the sons by, what is called, "the right of representation;" that is to

Digitized by Google

say, the grandsons stand in the place of their father, and take the share, which he would have taken, if he had survived the deceased; but under the Mahomedan Law the grandsons obtain in that case no share at all, being excluded by the sons as nearer of kin.

What Law of inheritance applicable.

81. The rules of inheritance are for Mahomedans, the Mahomedan Law of inheritance, Reg. 4, 1793, Sect. 15; for Hindoos, the Hindu law of inheritance, Reg. 4, 1793, Sect. 15; for British subjects and for Indo Britons, the English Law of inheritance; S. D. A. Rep. vol. ii. p. 229; vol. iv. p. 243; for native Portguese, of the Catholic faith, the Portugese Law of inheritance, S. D. A. Rep. vol. ii. p. 227; for foreigners, their respective laws of inheritance; S. D. A. Rep. vol. v. p. 176. For native Christians it must be the law of their ancestors, either the Mahomedan or the Hindu, as they or their ancestors have belonged to the one faith or the other.

Necessary requisites to inherit, I. that the inheritor is dead, 2. that the heir is alive.

82. To inherit it is necessary, 1st. that the person whose property is to be acquired by inheritance is dead,[1] 2ndly, that the person who is to acquire the property—the heir—is alive. If any of those two facts are disputed, they must be proved.[2]

Missing person.

The fact that a person has been missing for a considerable period of time without any knowledge of his existence is generally considered as a proof of his decease, and as establishing a legal title to succession on the parts of the heirs.[3] (Section 136.)

1 Retirement from the world and degradation operate as natural death according to Hindu Law. Daya Bhaga, vol. i. p. 3. Dig. book v. s. 6. Prince. Hindu Law, vol. ii. p. 2. 130. After the death of the father and the mother sons may divide his Estate, Menu, ix. s. 104. Daya Bhaga, ch. i. s. 14. Dig. book v. s. 5.

2 Hedaya, vol. iv. p. 6.

3 Twelve years absence is required by Hindu Law, Mussummaut Ayabuttee *versus* Raikissen Shaw, S. D. A. Rep. vol. iii. p. 28. Prince. Hindu Law, vol. ii. p. 9, 26, and "that the missing person would have been ninety years of age at that time if alive" by Mahomedan Law. Serajiyak, S. D. A. Rep. vol. v. p. 108. Bailie, 166.

If the inheritee and the heir die at the same time.

83. Should the inheritee and the heir have died by the same accident (for instance, in a shipwreck, by a fire, &c.,) and it cannot be proved who died first, it must be presumed that the death was simultaneous and the one cannot inherit the other, but the Estate of each will go to their respective surviving heirs, as if the intermediate heir, who died at the same time, had never existed.

Digitized by Google

Sirajiyyah. Prince. Mahomedan Law, 30. Bailie, 172. See also 2 Blackstone's Com. 516, Note.

Posthumous children inherit.

84. It is not necessary that the heir should be actually born; it is sufficient that he was begotten and afterwards born with vitality. When born with vitality it is of no moment how soon after the child may expire; the right of inheritance is acquired, and the inheritance devolves on the heirs of the child.

Hedaya, vol. ii. p. 670. Digest, book v. s. 117. Prince. Hindu Law, vol. ii. p. 176.—10 & 11. Will. 3, Sect. 16. 2 Blackstone's Com. 169. Toller, 374.

3. That the person claiming the inheritance is the true heir.

85. A third requisite is that the heir is really connected with the deceased in the manner stated by him and required by law. That is to say, if the heir claims as son, that he is the progeny of the deceased, and not of another person; if he claims as legitimate son, that his father and mother were legally married; or if he claims as brother, that he is the son of the same parents as the deceased, or of his father, or of his mother. Whenever it is disputed whether a person is the heir or not, it must be proved in the regular way, but as the inheritance is the sole right of the heirs, their testimony or acknowledgment must be credited in every matter which affects it.

Hedaya, vol. i. p. 381. If a man acknowledge a boy to be his son and afterwards die, and the mother then declares herself the wife of the deceased, she is to be believed and inherits, if she is a freewoman. Hedaya, vol. i. p. 384 Princ. Mahomedan Law, 132.

CHAPTER IV.

On the order of Succession according to Mahomedan Law.

The order of succession different according to the doctrines of the Soonees and the Shias.

86. The order of succession is different according to the doctrines of the Soonees and the Shias, though both have the same basis, viz. the following passage in the Koran.

"God hath thus commanded you concerning your children. A male shall have as much as the share of two females; but if they be females only, and above two in number, they shall have two third parts of what the deceased shall leave; and if there be but one; she shall have the half; and the parents of the deceased shall have each of them a sixth part of what he shall leave, if he have a child: but if he have no child, and his parent be his heirs, then

his mother shall have the third part, and if he have brethern, his mother shall have a sixth part after the legacies, which he shall bequeath, and his debts be paid. Ye know not whether your parents or your children be of greater use unto you. Moreover you may claim half of what your wives shall leave, if they have no issue; but if they have issue then ye shall have the fourth part of what they shall leave, after the legacies which they shall bequeath and their debts be paid; they also shall have the fourth part of what ye shall leave, in case ye have no issue; but if ye have issue, then they shall have the eighth part of what ye shall leave after the legacies which ye shall bequeath, and your debts be paid. And if a man or woman's substance be inherited by a distant relation and he or she have a brother or sister, each of them two shall have a sixth part of the estate; but if there be more than this number, they shall be equal sharers in the third part, after payment of the legacies which shall be bequeathed, and the debts without prejudice to the heirs."

"They will consult thee for thy decision in certain cases: say unto them, God giveth you these determinations concerning the more remote degrees of kindred. If a man die without issue and have a sister, she shall have the half of what he shall leave, and he shall be heir to her, in case she have no issue; but if there be two sisters, they shall have, between them, two third parts of what he shall leave; and if there be several, both brothers and sisters, a male shall have as much as the portion of two females." Koran, Chapter 4.

Al Sirajiyyah (W. Jones' Works, vol. iii. p. 505, 4to. Edition.) Prince Mahomedan Law, p. 1 to 41; p. 83 to 165. Bailie: Mahomedan Law of Inheritance Calcutta, 1832.

Interest of heirs protected.

87. By the above rules the rights of all parties are fairly secured. After the payment of funeral charges, debts, and legacies as far as one-third of the residue, the remainder will go to the heirs; and not only the children, but the father, the mother, husband or wife are all simultaneously entitled to a portion thereof, and their interest is so carefully protected that even gifts on death-bed are considered as bequests, and are reckoned in the one-third of which the proprietor is allowed to dispose by legacies, and acknowledgments of debt made on a death-bed in favour of

Digitized by Google

an heir, are utterly void, unless afterwards assented to by the other heirs.

Hedaya, vol. iv. p. 190; vol. iii. p. 164, Bailie, p. 4.

Heirs cannot be disinherited.

88. Neither a child nor any other heir can be disinherited, nor can one heir be favoured to the prejudice of the other; but as a man is at liberty to dispose of his property as he pleases, *during his life time*, he can, under the common rules of gift, make such disposals, as will virtually amount to a disinheritance, or a disposal in favour of one of his heirs.

Princ. Mahomedan Law, p. 121.

Peculiarites of Mahomedan Law.
No distinction between ancestral and acquired property.
No right of primogeniture.
Females inherits.

89. In the distribution of the estate among the heirs the Mahomedan Law has several peculiarities. There is no distinction between real and personal, or between ancestral and acquired property; primogeniture confers no superior right, but all the sons, whatever their number, inherit equally; females are not only not excluded from inheriting, but besides that some—the widow, mother, daughter and sister—are very near heirs, females always[1] get half the share of their brothers, when inheriting with them, and take with the same full proprietary right as males; so that the property devolves after their death on *their* heirs. The same is the case with widows, who take their share without any restriction in the disposal of it, and after their death, the property inherited from the husband, goes to their heirs, not to the heirs of their husband.[2] A right of representation (Sect. 80) is unknown; the nearer of kin exclude the more remote, and illegitimate children inherit only from the mother and mother's kindred.[3] According to most rules of inheritance, the descendants exclude all other relations, but by Mahomedan Law, parents, children and the widow or widower are simultaneously called to inherit.

No right of representation.

1. Princ. Mahomedan Law, p. 2, 84, except half brothers and sisters on the *mother's* side, who share equally. (Sect. 112.)

2. Ibid p. 85.

3. Ibid p. 91.

A. According to the Doctrine of the Soonees.

2. *Order of Succession.*

Order of succession.

90. Of the heirs, there are some for whom the law has provided certain specific shares or portions, and who are thence de-

nominated *Sharers*. In most cases there must be a residue after the sharers have been satisfied, and this passes to another class of persons, who from that circumstance may be termed *Residuaries*. The name however is not always appropriate, for it may happen, that the deceased has not left any relatives of the class of sharers, and then the whole will pass to one or more individuals of the second class. When there are sharers but no residuaries, the surplus, which would have passed to the latter, reverts to the former, with two exceptions, (Sect. 128) being divisible among them according to the respective amount of their shares, and this right of reversion constitutes what is technically called *the return*. It can but seldom happen that the deceased should leave no individual connected with him, who would come under one or other of the classes already mentioned. But to guard against this possible contingency, the law has provided another class of persons, who, though many of them are nearly related to the deceased, have yet been denominated *distant kindred*, by reason of their remote position with respect to the inheritance.

1 Sharers.

2 Residuarie.

The return.

3 Distant kindred.

Sirajiyyah and Shureefeea. Bailie, p. 12.

91. The portion of those who are legal sharers only, and not residuary heirs, can be stated determinately; but the portion receivable by those who are both sharers and residuaries, is variable, and must be adjusted with reference to each particular case. For instance, in the case of a husband and wife, who are sharers only, their portion of the inheritance is fixed for all cases that can occur; but in the case of daughters and sisters, who are under some circumstances legal sharers, and under others residuaries, and in the case of fathers and grandfathers, who are under some circumstances, legal sharers only, and under other residuaries also, the extent of their portion depends entirely upon the degree of relation of the other heirs and their number. Daughters without sons are legal sharers, and so are sisters without brothers, but with them, they are residuaries. Grandfathers and fathers with sons, son's son, &c. are legal sharers, but with daughters only, they are residuaries as well as legal sharers.

The portion of husband and wife are absolutely determinable, the sharers of other heirs vary in each case.

Princ. Mahomedan Law, p. 8.

92. Should there be neither sharer nor residuary, nor any of

4 Successor by contract

Digitized by Google

the distant kindred alive and capable of inheriting, the Estate goes (unless there be a widow or a widower, who is first entitled to a share) to him who may be called the successor by *contract*.[1] The form of this contract is as follows : a person of unknown descent says to another ; " thou art my Mawla (master) and shall inherit to me when I die paying my fine, when I commit an offence ;" and the other answers : " I have accepted."

1. Bailie, p. 15.

5 By acknowledgment of kindred.

93. Next to the successor by contract is a person in whose favour the deceased has made an acknowledgment of kindred, but of such a nature as not to establish his consanguinity. To make such an acknowledgment valid, three conditions must be observed. 1. It must be in such term as at least to imply the descent of the person acknowledged from some other person than the acknowledger himself. 2. It must be such, as not to establish the descent of the person acknowledged, for instance not an acknowledgment of one as a brother *assented to by the acknowledger's father*, which under some exceptions would establish the paternity, as this would give the party an interest in the inheritance on a ground distinct from the acknowledgment, namely as brother to the deceased ; 3. The acknowledgment must never have been retracted.

Bailie, p. 17. Commentary on the Sirajiyyah by Sir W. Jones' Works, vol. iii. p. 558, 4to. Edition.

6 Universal legatee.

94. Though the law does not allow a Mahomedan the power of disposing by will of more than a third of his property, still if he has appointed a legatee of the whole and has left no known heir, nor successor by contract, nor successor acknowledged as last mentioned,—such legatee is permitted to take the property ; for the prohibition against bequeathing more than a third exists solely for the benefit of the heirs.

Sirajiyyah and Shureefeeah, Bailie, p. 13. Mahomud Ameenooddeen Khan *versus* Mahomud Koobeerooddeen, S. D. A. Rep. vol. iv. p. 49. Princ. Mahommedan Law, p. 243.

7 Public Treasury.

95. Last of all, when there are none of the persons before mentioned to claim the property, it falls to the public treasury. The Governor General in Council will order how it shall be applied. (Sect. 52.)

Digitized by Google

3. *On Sharers.*

96. The Shares are : a half, a fourth, an eighth, two-thirds, one-third and a sixth. And there are twelve classes of persons for whom they are appointed ; of which four are males, namely, the father, true grandfather,[1] half brother by the same mother, and husband ; and the remaining eight are females, viz., the wife, the daughter, daughter of a son how low soever, that is, of any male descendant connected with the deceased entirely through males, sister of the full blood, or by the same father only, or the same mother only, the mother and true grandmother.

There are six shares and twelve sharers, four male, eight female.

1 A true grandfather is a male ancestor into whose line of relationship to the deceased a female does not enter—a false grandfather into whose line a female is interposed

97. The persons above enumerated do not all succeed simultaneously, nor are their shares constantly the same. On the contrary, some of them are in the most ordinary cases entirely excluded, and the shares of the others, though they are always entitled to some participation in the inheritance, are liable under certain circumstances to reduction. The latter class includes the husband and wife, father, mother and daughter ; the former, the seven other persons. The exclusion of these persons is founded upon two general principles applicable alike to shares and residuaries. 1st. That a person who is related to the deceased through another, has no interest in the succession during the life of that other, with the exception of half brothers or sisters by the mother, who are not excluded by her. 2nd. That the nearer relative to the deceased excludes the more remote. Thus a grandfather is excluded by a father upon both principles, being more remote and also connected through him with the deceased, and a grandson is excluded by a son upon both principles, when that son is his father, and upon the second principle, when he is his paternal uncle.

Some of the sharers are liable to partial and others to total exclusion,

Bailie p. 57.

98. The share of a husband,[1] is one-half ; but it is reduced to a fourth when there is a child or child of a son how low soever, that is, any male decendant connected with the deceased entirely by males. And to one or other of these shares the hnsband is al-

Share of the husband.

Digitized by Google

ways entitled, being one of the persons who are never entirely excluded (Sect. 97.)

1 If he has divorced her, he takes nothing. Princ. Mahomedan Law, p. 118

Share of the widow.

99. The share of a wife is the half of a husband in similar circumstances; being an eighth when there is a child or child of a son, how low soever, and a fourth when there is none. If the deceased leaves several widows, they share the said one-fourth or one-eighth equally among them.

The share of a daughter.

100. A daughter' share, when there is only one, and no son, is a half of the property; and the share of two or more daughters in the same predicament is two-thirds among them. When there is a son they lose their character of sharers and become residuaries with him by reason of the principle laid down in the Koran "that the portion of a son shall be double that of a daughter."

The share of a son's daughter.

101. When the deceased has left neither son, nor daughter, nor son's son, the share of the inheritance appropriated to daughters passes to the daughters of the son, who then come in to the place of daughters in every respect, namely, a half is the share of one, and two-third of two or more. When there happen to be in the same degree with daughters of the sons, one or more males who are residuaries, as their own brother or the son of their paternal uncle, the son's daughters become residuaries in the same manner as daughters.

Son's daughter excluded by sons.

102. As the shares of daughters sink into the residue when there is a son, there can be nothing to pass to the series of heirs beyond them, and the son's daughters are therefore always excluded by the existence of a son. They are likewise excluded as *sharers* when the deceased has left two or more daughters, though no son, because the whole of the two-thirds appropriated to daughters is then exhausted by themselves. But where there is only one daughter and no son, the complement of two-thirds after deducting the moiety, being one-sixth of the Estate, passes to the daughters of the son.

and as sharers by two or more daughters.

They take sometimes as residuaries, with two or more daughters.

103. Though son's daughters are entirely excluded as *sharers*, when there are two are more daughters, they are nevertheless in some instances admitted to a trifling participation in the inheritance by the opperation of the rule already noticed. This happens

Digitized by Google

when there is a male, or males, in the same or a lower degree entitled to the residue. Suppose that the deceased has left no son, but two or more daughters and grand children both male and female by a son. Here two-thirds being set apart for the daughters, there is nothing to pass to the son's daughters as sharers; but if there be no other legal sharers, the remaining third his divided, as residue between the grand children, in the ratio of two parts to a male and one to a female. Strictly speaking, the operation of this rule ought to be confined to the case where the residuary is in the same degree with the daughters of the son. But it has seemed hard that they should be deprived, by a more remote relative, of an advantage, which they enjoy with one who is nearer, and the rule has been extended accordingly.[1] The extension however is limited to cases where the more enlarged construction is beneficial to them; for whenever they happen to be legal sharers, it is only by a male of the same degree, that they can be made residuaries.

The same principles are applicable to the daughters of a grandson and so on.

1 Sureefeea. Bailie, p. 62.

The share of the father.

104. The father is a "sharer" as well as a "residuary." As sharer his portion is one-sixth. He is simply a sharer, being entitled to a sixth of the estate, when the deceased has left a son, or son's son how low soever. When there are only daughters or son's daughters, he is both a sharer and residuary; and simply a residuary where there is no child, nor child of a son how low soever.

The share of the true grandfather.

105. The true grandfather (Sect. 96,) takes one-sixth as the father, but is excluded by the father, if he be living. He is also liable to be affected by the rights of the mother and grandmother. Thus a paternal grandmother, who is entirely excluded by the father, is capable of inheriting with the true grandfather; and a mother, who when there is a father and a husband or wife, gets no more than a third of the remainder, after deducting the share of the husband and wife, is entitled to one-third of the whole, when there is a grandfather instead of a father.

The share of the mother.

106. The share of a mother is a sixth, when there is a child living, or the child of a son how low soever, or two or more of

Digitized by Google

brothers and sisters whether of the whole or half blood. And in all other cases, with only two exceptions, her share is a third.

Share of mother with husband *or* wife and father.

The exceptions are 1st. when the deceased has left a husband and both parents; or, 2nd. a wife and both parents. If, in the first case, the mother should take one-third, the husband's share being one-half, the father would only get one-sixth; and, in the second case, if she took one-third, the wife's share being one-forth, the father would only get five-twelfths, both of which would disagree with the general rule that the share of a male shall be double that of a female, when they succeed together. To avoid this inconsistency, the share of the mother is reduced to *one-third of the remainder*, after deducting the portion of the husband or wife, by which means the proper ratio is preserved between the shares of the father and mother; for the former being in this case the residuary will take the remaining two-thirds, or exactly double the portion of the latter.

The benefit of the deduction in mother's share by the existence of brothers and sisters, goes to father.

107. It has been observed, that the mother's share, when there are two or more brothers and sisters, is a sixth. It will be seen hereafter, that brothers and sisters are entirely excluded by the existence of the father; yet it may be asked, whether the other sixth, which they are thus the means of cutting off from the mother, belongs to themselves, or devolves on the father? This question has given occasion to much discussion, but Aboo Huneefah has determined in fovour of the father on the strength of the following passage in the Koran, "but if he have no child, and his parents be his heirs, then his mother shall have the third part; and if he have brethern, his mother shall have a sixth part." Here it is contended, that has the father is undoubtedly entitled under the first clause of the sentence to the remainder, after deducting the mother's third, so the latter part of the sentence ought to be taken as if it had stood thus: "and if he have brethren, *and his parents be his heirs*, his mother shall have a sixth part, and his *father the remainder*.

Shureefeea Bailie, p. 64.

The share of the true grandmother.

108. The share of a true grandmother[1] is a sixth, which, if there be more than one of them in the same degree, is divided between them equally. True grandmothers are excluded by the

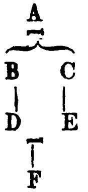
existence of the mother; those on her own side for two reasons; first, because they are connected with the deceased through her; and secondly, because they have but one common cause of succession, namely, maternity. She excludes the paternal grandmothers for the latter reason only. These are also excluded by the existence of the father, or the paternal grandfather, but the maternal grandmothers are not excluded by them.

The nearest excludes the more remote.

Amongst grandmothers, the most remote is excluded by the nearer, even though she should be incapable of taking any part of the inheritance. Thus the paternal grandmother is excluded by the father, but she is nevertheless capable of excluding the mother of the mother's mother, though the latter would not, as noticed, be excluded by the father himself.

Different opinion of the share of a grandmother related on both sides.

When a grandmother is related to the deceased on both sides, she takes, according to Muhammed, double the share of a grandmother only related on one side from the portion (one-sixth) allotted to the grandmothers, but according to Aboo Yoosuf, whose opinion is the most approved, they share equally.[2]



For instance according to this table, let F be the deceased; D and E his father and mother are both the grandchildren of A; A is consequently the great grandmother of F on the father's as well as on the mother's side.

[1] A true grandmother is any is lineal female ancestor in whose line of relationship a false grandfather does not enter (Sect. 96.) The mother's mother and the father's mother are of course true grandmothers, as the father's father is a true grandfather; but the mother's father's mother is a false grandmother and the mother's father and the father's mother's father is a false grandfather.

[2] Shureefeea. Bailie, p. 67.

The share of a full sister.

109. Sisters by the same father and mother take in default of children, or children of a son how low soever, as daughters, namely a half is the legal share of one; and two-thirds of two or more.

If there be full brothers, the sisters become residuaries through them by reason of their equality in the degree of relation to the deceased, but the male has the portion of two females.

Excluded by son, son's son, father and true grandfather.

In all these cases, however, the share of the sisters is liable to be intercepted by a father or true grandfather, by whom they are

Digitized by Google

absolutely excluded, as well as by a son or son's son how low soever.

Sirajiyyah. Bailie, p. 67.

Becomes residuaries with two or more daughters.

110. When there are two or more daughters, or daughters of a son how low soever, but neither son nor son's son, father or true grandfather to exclude them, it would be hard if the remainder should go to a residuary less closely connected with the deceased than sisters. The prophet himself has anticipated and obviated this hardship, by directing that sisters in this case, shall be residuaries with daughters or the daughters of a son; and their portion will be either one-half or a third, as there may be one or more in existence. Yet full sisters cannot supersede the husband or wife, mother or true grandmother. These being legal sharers must be satisfied before any thing can pass to a residuary.

Share of half sisters by the father.

111. Half sisters by the father come into the place of full sisters when there are none; that is, the share of one is a half, and of two or more, two thirds, while with daughters and son's daughters, they become residuaries. With *one* full sister, whenever she is entitled to a half, they take the complement of two-thirds, viz. one-sixth; but by two or more full sisters they are entirely excluded, unless there happens to be a half brother by the father, who makes them residuaries, when they become entitled to participate in the residue in the ratio of two parts to a male, and one to a female.

Share of half brothers and sisters by the mother.

112. Half brothers and sisters by the same mother, are entirely excluded by the existence of a child, or the child of a son how low soever, or of a father or true grandfather; and in all other cases, the legal share of one is a sixth, and of two or more, one-third. There is no distinction in this case in favour of the sex, both males and females having the same right and succeeding equally.

It is said, Princ. Mahomedan Law, viii. 2, "that the general rule of a double share to the male applies to their issue," but there issue are neither sharers nor residuaries, but belong to the distant kindred (Sect. 124,) and it is the general opinion, that there succession is regulated in the same way as that of their parents, without any distinction on account of sex. Bailie, p. 69.

4. *On Residuaries.*

The surplus

113. In most of the cases mentioned in the last Chapter, there

Digitized by Google

is a residue after the portions of the legal sharers have been separated from the estate; this residue passes to a class of persons who are termed residuaries by the learned, and who orginally seem to have been the sole heirs of an intestate person.

of the Estate after the sharers have been satisfied goes to the residuaries.

114. The residuaries are either so by relation or by a special cause. Residuaries by relation are of three kinds; the residuary in his own right; the residuaries in another's right and the residuary together with another.

Different kind of residuaries.

115. The two last clases have been mentioned in the former Chapter; the residuaries in another's right are daughters, (Sect. 100) son's daughters, (Sect. 101,) full sisters and half sisters by the father, (Sect. 110, 111) all of whom lose their character of sharers and become residuaries, when there exist one or more males in the same or a lower degree. Residuaries with another are sisters with two or more daughters, or daughters of a son how low soever. (Sect. 110.)

Residuaries in right of another.

And with another.

116. The residuary in his own right is, "*every male* in whose line of relation to the deceased no female enters." They are of three classes:

Who are residuaries.

1st. Descendants; 2nd. Ascendants; 3rd. Collaterals.

117. The first class is the male offspring of the deceased; first, his sons; then, their sons and son's son, and so on in the direct male line; there is no right of representation; the sons of the deceased son ar excluded by the other surviving sons.

1. Descendants.

118. The second class contains "the root," or the paternal ancestors of the deceased; first, the father, then, the paternal grandfather, great grandfather and so on. The nearer exclude the more remote.

2. Ascendants.

119. Of the collaterals, the offspring of the father comes first, viz. the brothers of the deceased, then, their sons how low soever; then comes the offspring of the grandfather, viz. the uncles of the deceased, then, their sons how low soever; then comes the offspring of the great grandfather and their sons how low soever, and so on.[1] The nearest in degree is preferred to the more remote, and of those related *in the same decree*, those of the whole blood are preferred to those of the half.

3. Collaterals

Digitized by Google

1 Sir W. Jones' Works, vol. iii. 587—and Sir W. Macnaghten.—Princ. Mahomedan Law, P. 7, No. 48,—limit the collateral heirs to the two lines, viz. to the fathers and granfathers, but this is incorrect. Every male in whose line of relation to the deceased no female enters are distinctly called residuary heirs and the word "grandfather" comprehends all paternal ancestors. The word "nearest" grandfather in the Calcutta Edition of Sirajiyyah is an interpolation, which disagrees with the definition of "residuary heir" and with the Koodooree and the Futwa Alumgeree, see Bailie, P. 77. By a degree in the Supreme Court 2nd term 1831, Doe on the demise of Sheikh Mohummud Buksh *versus* Shurf-oon-Nissa Begum and Tajun Bebee, it was decided, that a male descendant of the great grandfather was a residuary heir.

4. Emancipator.

120. A residuary through a special cause is one who is the *emancipator*, or emancipatrix of a freedman, who, and whose residuary heirs in the order before stated, inherit from a freedman, who dies without residuary heirs by descent. The legal sharers of the emancipator are excluded from taking any share, and females have been expressly excluded in this case by the prophet himself.

When the freedman leaves father and son of his emancipator, Aboo Yoosuf considers the father entitled to a sixth, but Hunifah as well as Mahomed vests the whole right in the son.

5. *Of distant Kindred.*

Who are distant kindred.

121. When there are neither sharers nor residuaries, the inheritance goes to "the distant kindred," which comprehends "all relatives, who are neither sharers nor residuaries." Of the distant kindred there are four classes:

They comprehend four classes.

1. The children of daughters, and son's daughters, how low soever, and whether male or female.

2. The excluded or false grandfathers, as the maternal grandfather and his father, and the excluded or false grandmothers how high soever, as the mother of the maternal grandfather, and the mother of the maternal grandfather's mother.

3. The children of sisters, whether male or female, and the daughters of brothers how low soever, and whether the sister or brother from whom they are descended was connected with the deceased through both parents, or only through one; also the sons of half-brothers by the mother, how low soever.

4. The paternal aunts, (viz. father's sisters) and paternal uncles by the mother, (viz. the half-brothers of his father by the same

Digitized by Google

mother) and the maternal uncles and aunts and their children how low soever, and of whichever sex.

[1] There are different reports of the opinion of Abu Huneefah with respect to the first and second class; Abu Suleimann says, that Abu Huneefah declared the second class to be the nearest. Bailie, p. 127.

Distribution in the first class of distant kinderd.

1. The nearest in degree preferred to the more remote.

122. In the first class: 1. *The nearest in the degree* is preferred to the more remote. Thus the daughter of a daughter is preferred to the daughter of the son's daughter; the first being related to the deceased in the second, the other in the third degree.

2. One related through an heir preferred to one not so related.

2. Of claimants in equal degree, *they who are related to the deceased through an heir* (a sharer)[1] have preference over those not so related. Thus the daughter of a son's daughter is preferred to the son of a daughter's daughter. Both are related to the deceased in the third degree, but a son's daughter is an heir, and a daughter's daughter is not an heir; the first therefore excludes the other.

3. Distribution, regulated by the sex of the root and number of the branches.

3. If their degrees are equal, and they are on the same footing with respect to the person through whom they claim, all or none of them being the offspring of heirs, but if the *sexes of the ancestors* differ in any stage of ascent, the distribution will be made with reference to such difference of sex, regard being had to the stage at which the difference first appeared, so that the branches will obtain the inheritance of the root.[2] Thus the daughter of the daughter of a daughter's son, will receive twice as much as the son of the daughter of a daughter's daughter, because one of the ancestors of the former was a male, whose portion is double that of a female. Again, let us suppose that there are five claimants descended in the fourth degree from three ancestors, as in the following scheme.

Deceased.

daughter	daughter	daughter
son	daughter	daughter
daughter	son	daughter
dr. dr.	daughter	son son

The difference of sex here first appears in the second stage, where there is a son with two daughters. The portion of the son being equal to that of both daughters, the estate ought to be divided in-

Digitized by Google

to four parts, of which two would go to the son, and one to each of the daughters. But the son has two branches, that is two daughters among the claimants and the sex being taken from the root, and only the number from the branches, the single son becomes equivalent to two, and his shares are accordingly raised to four. Of the second daughter there is only one branch; but of the third there are two; namely, two sons in the line of the claimants; and the sex being considered in the root at the first stage, where the difference appears, and the number in the branches, the single daughter in the second stage is equivalent to two daughters and her share is accordingly doubled. The Estate is thus divided at the second stage into two lots, one containing four parcels for the sons, and the other three parcels for the daughters. The portion of the son passes without division, till it reaches his two granddaughters, who are each entitled to two parts, while the three parts of the daughters undergo a new division in the third stage, where there is a son and a daughter; but the daughter having two branches, her share is doubled, becoming the same as the son's so that three-fourteenths compose the share of each and pass to their respective representatives. The daughter being represented by two sons, her portion must be further divided into two parts and each will obtain three twenty-eighths; the Estate being divided into twenty-eight parcels, will then be divided thus 8. 8. 6. 3. 3.

4. One ralated on both sides takes in right of both.

4. The person related on both sides with the deceased, takes in right of both. Thus, if there be a son of a daughter's daughter of the deceased, and two daughters of a daughter's daughter, who are also the two daughters of a daughter's son, the two daughters take in right of their father, sixteen shares, and in right of their mother, six shares; and the son takes only six shares in right of his mother.

1 By the child of an heir is meant the child of "*a sharer.*" See Shureefeeah Bailie, p. 130.

2 This is the opinion of Muhammed, whose opinion is preferred. Aboo Yoosuf considers only the sex of the heir, not the sex of the ancestor. Bailie, p. 130. Sir W. Jones's Works, vol. iii. p. 540.

Distribution in the 2nd class [illegible] distant kin-

123. In the second class the succession is also regulated by proximity and the condition and sex of the person through whom

Digitized by Google

the succession is claimed when the claimants are related on the same side; when the sides of relationship differ, two-thirds go to the paternal and one to the maternal side, without regard to the sex of the claimants.

For instance, the claimants being a maternal grandfather and the mother of a maternal grandfather, the former being more proximate excludes the latter; but if the first be the father of a maternal grandfather, then the claimants are equal in point of proximity, the side of their relationship is the same, and they are equal with respect to the sex of the person through whom they claim, the only method therefore of making the distribution is by having regard to the sexes of the claimants and giving a double share to the male.

Distribution in the 3rd class of distant kindred.

124. The same rules apply to the third as to the first class. The rule that brothers and sisters by the same mother take *equally* without any distinction of sex, (Sect. 112,) does not extend to their issue, the male takes as two females.

Case.

For instance:—Let the deceased have three nieces, surviving him, the daughters of different kinds of brothers and three nephews and three nieces, the children of different kind of sisters after the following scheme:

Full br.	full sr.	br. by father	sr. by fr.	br. by mr.	sr. by mr.
daughter	s. d.	dr.	s. d.	daughter	s. d.

Here 1st. one-third of the property is to be allotted to the descendants of the half brother and sister by the mother, and divided equally among them on account of the equality of their roots. The sister having two branches, viz. a son and a daughter, is accounted the same as two sisters, and her portion is therefore two-thirds of the third, which accordingly pass to her descendants among whom they are equally divided, and the remaining third of that third, being the portion of the brother, who has only one branch, goes to his daughter.

2nd. Two-thirds of the whole property still remain, which belong to the descendants of the full brothers and sisters, who entirely exclude half brothers and sisters, by the father. (Sect. 111.) The sister here has also two branches, by which means her por-

Digitized by Google

tion is doubled and raised to an equality with that of her brother. One-third goes therefore to the daughter of the full brother, and the other third is to be divided between the children of the full sister in the proportion of two parts to the son and one to the daughter.

Another case. Again, suppose the deceased to have left the son of a daughter of a half-brother by the father, two daughters of the son of a half-sister by the father, who are also the children of a full sister's daughter and the daughter of the son of a half-sister by the mother, as in the following scheme :

h. B. by F.	h. S. by F.		Full sister	h. S. by M.
daughter	son	——	daughter	son
son		two daughters		daughter

Here first the half-sisters by the mother will take a sixth (Sect. 112) ; the full sisters, having two branches, is accounted the same as two full sisters, and will take two-thirds, and the remaining one-sixth will go to the half-brother by the father as residuary. (Sect. 119), when is sister would also participate with him, but she has two branches in the present case, and her portion will therefore be equal to her brother's or each will take one-twelfth. This twelfth of the sisters must again be divided between her two granddaughters, who each will get 1-24. The $\frac{1}{6}$ of the half sister by the mother will pass to her granddaughter. The $\frac{2}{3}$ of the full sister will in equal shares go to her granddaughters, who also each will get 1-24 from their other grandmother ; and the remaining 1-12 will go to the grandson of the half-brother by father.

Distribution in the 4th class of distant kindred. 125. In the 4th class those of the whole blood, are preferred to those of the half blood ; and those connected by the same father only, are preferred to those by the same mother only, whether they be male or female ; if their relation be equal and there are claimants of both sexes, the males will have a share double that of a female.

Case. Thus a *maternal* aunt by the same father only will exclude a *maternal* aunt by the same mother only, but if the sides of their relationship differ, for instance, if one of the claimant be a *paternal* aunt by the same father and mother, and the other be a *maternal*

Digitized by Google

by the same father only, no exclusive preference is given to the former, though she obtains two shares in virtue of her paternal relation.

Their children.

126. The succession of the children of the above class, that is, the cousins, is regulated by the following rules: Propinquity to the ancestors is the first rule; where that is equal, the claimant through an heir inherits before the claimant through one not an heir, without regard to the sex of the claimants.

Case.

Thus, if there be the daughter of a paternal uncle and the son of a paternal aunt, both uncle and aunt being of the full blood to the father of the deceased, the former will take the whole estate as being the offspring of a residuary. But if the aunt was of the full blood and the uncle only of the half blood, the son of the former would be preferred by reason of the strength of propinquity. Some however maintain that the daughter of the paternal uncle by the father ought to have the preference in the supposed case by reason of her being the child of a residuary.[1]

Among claimants on both sides.

When the claimants though equidistant are not related on the same side to the deceased, the one is not preferred to the other, but two-thirds go to the claimants on the father's side, and one-third to those on the mother's side.

And their descendants.

In the distribution among the descendants of this class, the same rule is applicable as to the descendants of the first class (Sect. 122, No. 3.) Thus the two daughters of the daughter of a paternal uncle's son will get twice as much as the two sons of the daughter of a paternal uncle's daughter, supposing the relation of the uncles to be the same; and in case of equality in all other respects, regard must be had as above to the sexes of the claimants.

[1] Sirajiyyah. Bailie, p. 150.

In default of them to the same description of uncles and aunts and their children in the third and following lines.

127. If there be none of the above mentioned persons (Sect. 121, No. 4) in existence, the Estate will revert to the *maternal* uncles and aunts of the deceased's parents, the paternal uncles of his mother, and such of the paternal uncles of his father as were related to him by the mother only, and their children. Failing them it will revert to the same description of uncles and aunts of the parents of the deceased's parents and their children. And so

Digitized by Google

to no the more remote branches without any limit, the succession being regulated in the same way as in the fourth class. (Sect. 125, 126.)

Bailie, p. 153. See also Sect. 119, Note.

6. *On the return (surplus) and increase (deficiency.)*

On the return. 128. When on distributing the Estate among the legal sharers there is a surplus, such surplus goes to the residuaries; and if there be no legal sharers, the whole Estate goes to the residuaries, but if in the first case, there, be no residuaries to receive the surplus, that surplus reverts upon that to those legal sharers, who *are connected with the deceased by consanguinity*. This is called the return. The husband and widow get no share of the return as long as there are any heirs by blood alive, but when the deceased leaves no relative at all, the husband or widow takes the whole Estate.

Bailie, p. 3.

How divided. 129. If there be only one class of sharers, for instance, only daughters, the return is to be divided according to the number of the individuals; and if there be different classes, each class will get a proportional share, for instance a daughter, a son's daughter and a mother, whose shares are respectively $\frac{3}{6}$, $\frac{1}{6}$, and $\frac{1}{6}$ the surplus $\frac{1}{6}$ will be divided in the same ratio; or what is the same thing, the whole Estate will be divided into five parcels, of which the first will get three, the second and third each one.

Deficiency how deducted. 130. When on distributing the Estate it is found that the sum of the different shares *exceeds* the whole Estate, each of them must suffer a proportional deduction; or, in other words, the number of parcels must be increased. Thus, if the heirs be the husband, two sisters of the whole blood, two sisters by the same mother only and the mother, their legal shares in the order they are mentioned are $\frac{1}{2}$, $\frac{2}{3}$, $\frac{1}{3}$, and $\frac{1}{6}$ which added together gives $\frac{10}{6}$; but as ten parcels cannot be paid out of six, the Estate must be divided into ten shares; to the husband, three; to the two sisters of the whole blood, four; to the half sisters, two, and to the mother, one.

7. *On Impediment of Inheritance.*

Impediments 131. There are four impediments under the Mahommedan

Digitized by Google

Law. 1, homicide ; 2, slavery ; 3, difference of religion ; and, 4, difference of allegiance.[1]

to inheritance under the Mahommedan Law

Homicide is only so far an impediment that the slayer is precluded from succeeding to the property of a person whom he has slain, whether it was done intentionally or unintentionally.[2] The other three impediments are now abolished ; slavery by Reg. 5, 1843, Sect. 3 ; difference of religion by Reg. 7, 1832, Sect. 9 ;[3] and difference of allegiance by the subversion of the Mahommedan supremacy.[4]

When an heir is excluded from inheriting on account of disqualification, he is considered as not existing, and the Estate is divided accordingly.

1 Sirjiyyah. Bailie, p. 21. Hedaya, vol. ii. p. 228 ; vol. iv. p. 273. Prince. Mahomedan Law, p. 1.

2 Hedaya, vol. iv. p. 329.

3 "The laws of those religions—the Mahommedan and the Hindu—shall not be permitted to operate to deprive such Party—that is a party of different persuasion—of any property to which, but for the operation of such laws, they would have been entitled."

4 The reason why difference of country is a bar to inheritance is satated in the Sirajiyyah to be, "the want of mutual protection to the subject of different states;" as this is only applicable to a state of actual warfare, it cannot be an impediment in the present age. See also Bailie, p. 31.

8. *On the distribution of the Estate.*

132. The funeral expenses, debts and legacies having been paid, the remainder goes to the heirs in the order previously stated. Until a division has legally taken place, the Estate is considered to belong to the deceased, so that if there should be any increase to it after his death, such increase is considered a part of the Estate to be appropriated to the payment of debts, legacies, &c.[1] The first heirs are the "sharers." Several of these may occur together, and, in order to avoid fractions in the distribution, the Estate may, for practical use, be divided into certain parcels, of which each of the sharers receives his proportion. Thus the legal sharers being a wife and two daughters : the wife's share is $\frac{1}{8}$; that of the two daughters is $\frac{2}{3}$, which added together make 19-24. Now to avoid these fractions the Estate is divided into 24 parcels ; the first numerator being multiplied by 3 (the denominator

How to distribute the Estate.

Divide it in several portions

Digitized by Google

in the 2nd fraction) gives 3 portions for the wife ; and the second being multiplied by 8 (the denominator in the 1st fraction) gives 16 portions for the two daughters, or eight to each ; the remaining 5 will go to the residuaries. To find out the number of parcels into which the Estate in each case is to be divided, apply the common rules of arithmetic for the addition of fractions. If the denominators are prime, multiply the one by the other ; if they be composite, multiply the common denominator of the one by the other, and the product will be the number sought. If any of the shares, or the residue is to be distributed among several persons, multiply that number or its prime by the product already found.

Apply the common rules for addition of fractions.

Case.

Thus, let the heirs be a father, a mother and 10 daughters ; their shares in the order stated are $\frac{1}{6}$, $\frac{1}{6}$ and $\frac{2}{3}$, that is, the Estate is to be divided into six shares of which the father is to have one ; the mother one, and the 10 daughters amongst them, four ; but as the four shares cannot be divided among 10 persons without a fraction, either multiply the 4 shares by 5, having separated the shares of the father and the mother, and each daughter will get two portions of the residue divided into 20 shares : or divide the Estate at once into 30 shares, of which the father will then take 5, the mother, 5, and each of the 10 daughters, 2.

Another case.

Again, let the heirs be two wives, six female ancestors, ten daughters and seven paternal uncles ; then the share of the two wives is $\frac{1}{8}$, of the six female ancestors, $\frac{1}{6}$, of the ten daughters, $\frac{2}{3}$, and the uncles are the residuaries. Then take the denominators —8.6.3.—and seek their common denominator, which is 24, divide this number by the several denominators, and you will get as their respective shares, 3, 4 and 16, which make 23. The residuaries will consequently get one portion, which is what remains of the 24 portions into which the Estate has been divided. In order to divide these shares amongst all the parties, take the different numbers, viz. 2. 6. 10 and 7, seek the least common multiple which is 210, multiply that by the shares as previously found, viz. 3 × 210, 4 × 210. 16 × 210 and 1 × 210, and divide the product by the number of persons, viz. $\frac{3 \times 210}{2}$, $\frac{4 \times 210}{6}$, $\frac{16 + 210}{10}$, $\frac{1 + 210}{7}$. 210 multiplied by 3 gives 630 and divided by two gives 315 shares to each widow ;

Digitized by Google

210 multiplied by 4, gives 840 and divided by 6, gives 140 as the share of each female ancestor ; 210 multiplied by 16, gives 3360 and divided by 10 gives 336, as the share of each daughter ; and lastly, 210 multiplied by one, gives 210 and divided by 7 gives 30, as the share of each uncle. The whole Estate as thus to be divided into 24 + 210 or 5040 shares.

[1] Hedaya, vol. iv. p. 6.

When the distribution takes place after the death of an heir in the interval.

133. When the distribution first takes place after the death of some of the heirs, there must be as many distributions made as there are persons who have died. Thus, supposing A. dies leaving two widows B. C., four sons D. E. F. G. and two daughters H. I. but the distribution of the Estate does not take place until after the death of the two widows and one of the daughters. By his first wife B. the deceased had only one son D., and by his second wife C. one son E. and two daughters H. and I. ; his other two sons were the offspring of another woman. The death of the first wife B. occurred before that of the second ; and the death of the second before that of the daughter, who left a husband.

Case.

1. First, the Estate of A. must be divided among his 2 widows, his 4 sons and 2 daughters. The widows are entitled to $\frac{1}{8}$; the 4 sons and 2 daughters are the residuaries and take the residue $\frac{7}{8}$. Now as a son's share is that of two daughters, the shares of the 4 sons and 2 daughters are equal to the shares of 10 daughters, the Estate must therefore be divided into 80 shares, (8 + 10) of which each widow will get, 5 ; each son, 14 ; and each daughter, 7.

2. On the death of the widow B. her heir is her only son D. the oher children are only her step children, who of course are not at all related to her. B's five shares will therefore go to D, whose shares thereby become increased to 19.

3. On the death of the second widow C. her five shares will go to her son and two daughters E. H. and I., the other children D. F. and G. being only her step children. The shares of one son and 2 daughters are equal to the shares of 4 daughters ; the 5 shares are therefore to be multiplied by 4, and of these twenty shares, E. will have 10 ; H. and I. each 5.

4. On the death of the daughter H. she leaves as her heirs, her husband K. her full brother E. and her full sister I. D. F. and

G. are her half brothers on the father's side, who are excluded by the existence of the brother of the whole blood; (Sect. 119.) As H. left no children, her husband takes one-half of her shares, and E. and I. the other half, in the proportion of a double share to the male. H's shares are therefore to be multiplied by 6 of which the husband takes three parts, the brother E. two, and the sister I. one.

The whole division will therefore stand thus:

1. B. 5, C. 5, D. 14, E. 14, F. 14, G. 14, H. 7 and I. 7 of 80 shares.

2. C. 5, D. 19, E. 14, F. 14, G. 14, H. 7 and I. 7 of 80 shares.

3. For the next distribution the whole must be multiplied by 4

C. 20, D. 76, E. 56, F. 56, G. 56, H. 28. I. 28 of 320 shares, and the shares will stand thus:

D. 76, E. 16, F. 56, G. 56, H. 33, I. 33 of 320 shares.

4. For the next distribution the whole must be multiplied by 6:

D. 456, E. 396, F. 336, G. 336, 198, I. 198 of 1920 shares, and the shares will stand thus:

D. 456, E. 462, F. 336. G. 336, H. 231, and K. 99 of 1920 shares.

When one heir compounds with the other for his share.

134. When one of the heirs compounds with the other for his share of the inheritance by accepting in its stead a certain sum of money or some specific articles, the remainder is to be divided among the other heirs in proportion to their respective shares; as, when the husband relinquishes his share of the Estate of his wife in lieu of his wife's dower, which has remained unpaid and consequently constitutes a debt against him.

When the deceased leaves a pregnant wife.

135. When the deceased leaves a wife pregnant, and he has sons, the share of one son must be reserved in case a posthumous son should be born; if he has no sons and there are other relatives, who would succeed only in the event of his having no[illegible] (as would be the case for instance with a brother or sis[illegible] 3 × 210, immediate distribution of the property takes place, but if those other relatives would succeed at all events to some portion (larger without than with a child, as would be the case, for instance, with a mother) the property will be distributed, and the mother will

Digitized by Google

obtain a sixth, the share to which she is necessarily entitled, and afterwards, if the child be not born alive, her portion will be augmented to the third.

Princ. Mahomedan Law, p. 30. Bailie, p. 156.

When one of the heirs is missing.

136. When one of the heirs is missing, that is to say, when he is absent, and there is no certain intelligence whether he be alive or not, he is considered as living with respect to his own Estate, and as defunct with respect to the estate of others.

Thus, if he had an Estate when he disappeared, or if at the time he was entitled to a share in a joint property, such property cannot be inherited before his death be proved, or until he would have been ninety years of age (Sect. 82), but must remain in trust until that time, when it will devolve upon those of his heirs who are in existence at that time. On the death of any of the relatives of a missing person, to whom he is an heir, he is so far considered to be alive, that his share is set aside; but such share is not reserved in trust for him and his heirs, but delivered to the other heirs, who would have taken it, if he had been dead; if he returns, after this he will be entitled to his share, but if he does not return, it devolves on the heirs, who came into possession at the former distribution, but not to the heirs of the missing person.

Sirajiyyah. Hedaya, vol. ii. p. 293. Princ. Mahommedan Law, p. 92, 116 Bailie, p. 166.

Division of profit of endowments.

137. The profit of endowments for the support or benefit of descendants is not to be divided according to the common rules, but in equal shares amongst them; if one of them dies without heirs, his share will go to increase the share of the others; and if one of them dies leaving heirs, they will take his share in equal portions.

Princ. Mahomedan Law, p. 341.

Office of Mootwulee neither divisible nor hereditable, but the Guddee is.

138. The office of Mootwulee, that is, the superintendence of the *spiritual* affairs of an endowment, is not hereditable, nor can it be entrusted to a female,[1] but the Guddee or Sujjada Nisheen, that is the superintendence of the *temporal* affairs, is hereditable and may be held by a female.[2]

[1] Princ. Mahomedan Law, p. 332, 343.

[2] Prince Mahomedan Law, p. 343, M. Hyatee Khanum *versus* M. Koolsoom Khanum. S, D. A. Rep. vol. i. p. 214.

Digitized by Google

B. According to the Doctrine of the Shiites.[1]

9. *On the Order of Successions.*

The Shiites differ from the Soonees with respect to the distribution of the residue.

139. The Shiites, generally called the Emmaya sect, recognize the same legal sharers, the same shares, and the same heirs as the Soonees, but differ as to the distribution of the residue. The Soonees prefer the agnate kinsmen, (Sect. 113) but the Shiites prefer the nearest kin without reference to sex.

The share of husband and wife.

140. The husband and wife take their shares as with the Soonees in all cases; in failure of heirs, the husband takes the whole Estate of his wife; but the wife, under the same circumstances, is only entitled to her legal share, and the residue goes therefore to the public treasury.

First class of heirs.

141. In the first class of heirs are the parents, the children and grand children how low soever. The children exclude the grand children; the grand children the great-grand children without reference to sex, but grand children do not take their share accoring to the sex of their root; children of sons take the portion of sons, and children of daughters take the portion of daughters.

Second class.

142. The second class comprises two divisions 1, the grandfather and the grandmother and other ancestors; 2, the brothers and sisters and their descendants how low soever. The one division does not exclude the other how distant soever, but the nearest in decree in each division exclude the more distant.

Third class.

143. The third class comprises the paternal and maternal uncles and aunts and their descendants, the nearest of whom exclude the more distant. Those of the whole blood exclude those of the half blood in the same degree, and the son of a paternal uncle of the whole blood excludes a paternal uncle of the half-blood.

Fourth class.

144. In default of all the heirs above enumerated, the paternal and maternal uncles and aunts of the father and mother succeed and their decsendants to the remotest generation, according to their degree of proximity to the deceased. In default of all those heirs, the paternal and maternal uncles and aunts of the grand

---

[1] Princ. Mahomedan Law, p. 34. S. D. A. Rep. vol. v. p. 29.

Digitized by Google

parents and great-grand parents inherit according to their degree of proximity to the deceased.

145. When, on distributing the Estate among the legal sharers, there is a surplus, it goes to the heirs, and if there be no heirs, it reverts to the sharers in proportion to their shares.[1] The husband is entitled to share in the return, but not the wife. Neither is the mother entitled to share in the return, if there are brethren; and where there is any individual possessing a double relation, the surplus reverts exclusively to such individual. On the return.

[1] Rajah Didar Hussein *versus* Ranee Zahurun Nissa, S. D. A. Rep. vol. v. p. 29.

146. When the different legal shares exceed the Estate, the number of parcels is not, as according to the doctrine of the Soonees, (Sect. 130) to be increased, so that each heir suffers a proportional deduction, but the deficiency is deducted from such heir as may, under certain circumstances, be deprived of a legal share, or from any heir, whose share admits of a diminution. For instance, in the case of a husband, a daughter, and parents; their respective shares being $\frac{1}{4}$, $\frac{1}{2}$ and 2-6 or 13-12. The Soonees would have divided the estate into 13 portions, of which the husband would have taken 3, the parents 4, and the daughter 6, but the Shiites would divide the Estate into 12 shares, of which the husband would take 3, the parents 4, and the daughter the remaining 5, as her share is liable to extinction. For instance, if there had been a son, the daughter would not have been entitled to any specific share, but would have become a residuary, whereas the husband and the parents can never be deprived of their legal shares. And deficiency.

147. Of homicide (Sect. 131,) only that which is intentional is a bar to inheritance. Difference of allegiance is no bar according to this sect. Impediments to inheritance.

148. In the distribution of the Estate there is only this difference, that the elder son is entitled, if he be worthy, to his father's sword, his Koran, his wearing apparel and his ring. The eldest son entitled to sword, Koran, &c.

Digitized by Google

CHAPTER V.

On the Order of Succession according to Hindu Law.

1.—INTRODUCTION.

Foundation of the Hindu Law of inheritance.

1 Spiritual benefit of the deceased.

149. The law of inheritance of the Hindoos is connected with their opinion about transmigration. Wealth, say the Sages, is either for temporal enjoyment, or for spiritual benefit; now since the acquirer is dead, he cannot have the temporal enjoyment of it; it is therefore right that he should enjoy its spiritual benefit. The inheritance is therefore to be applied for the benefit of the deceased, and the order of succession is regulated by the degree of benefit. To extricate the spirit from its otherwise hopeless state, funeral rites are performed; to three, says Menu,[1] must libations of water be made, to three must oblations of food be presented; the fourth in descent is the giver of those offerings, but the fifth has no concern with them.

2. Right to maintenance of survivors.

The spiritual benefit of the deceased is thus the original foundation of the law of inheritance, but the right of certain persons to maintenance seems to have been subsequently recognised, and to have caused a new principle to be added,[2] and persons to be admitted as heirs, who would otherwise have been excluded; and as the new principle does not well agree with the former, the reasonings and arguments of the learned, in order to obtain consistency, are sometimes rather confused.

1 Menu, book, ix. sect. 186.

2 Daya Bhaga, i. No. 45, "they who are born and they who are yet unbegotton, and they who are actually in the womb, all require the means of support."

Succession does not depend upon nearness of kin, but upon the presentation of funeral offerings.

150. The succession is consequently not regulated by nearness of kin, but by presentation of offerings. The kinsman, who is allied by a common oblation, as presenting funeral offerings to *three* persons in the family of the father or of the mother of the deceased owner, is preferred to him who only presents oblations to two of his ancestors, and he again to him who only presents oblations to one. The inheritance goes first to the "*Sapindas*," that is to all those who partake of undivided oblations, as the paternal great grandfather, the grandfather, the father, the man himself, the brother of the whole blood, his son, son's son

Digitized by Google

and great-grandson;[1] and then to the more distant kindred "*Saculyas*" (those who share divided oblations) down to the "*Samanodacas*" (or kinsmen allied by the common libation of water) as far as the fourteenth decree.

1 Daya Bhaga, ch. xi. sect. 1, No. 38. Digest, book v. sect. 434.

And those relatives who cannot or will not perform the funeral rites are excluded.

151. As succession takes place in consideration of the benefit conferred on the deceased by the funeral offerings, those who cannot, either for a general or special cause, or those who will not perform the ceremonies, are necessarily excluded from becoming heirs. (Sect. 189.) The heir is bound to perform the funeral rites, but the act of performing them does not give any title to the succession, if the performer was not the person who ought to have performed them.[2]

1 Daya Bhaga, ch. v. and Vishnu, Digest, book v. sect. 455, 457.

2 S. D. A. Rep. vol. i. p. 22, note 1. Princ. Hindu Law, vol. i. p. 35.

Females cannot inherit on account of their sex.

152. Females cannot on account of their sex perform the periodical obsequies, and as they do not therefore confer any benefit upon the deceased and his ancestors, they are generally disqualified from inheriting.[1] From this rule there are only four exceptions for special reasons.

Exception.

1. The widow.

1. The *widow*, in consideration of the assistance rendered by her to her husband in the performance of his religious duties. A wife is considered half the body of her husband equally sharing the fruits of pure and impure acts. If there be no sons the widow presents the funeral oblations.[2]

2. The daughter who has or is likely to have male issue.

2. *The daughter*, who has or is likely to have male issue, on account of her continuing the line of succession. A daughter, who is a childless widow, or barren, or who has only daughters and is not likely to have male issue, is therefore excluded. The daughter's son is to present the funeral oblations, and he takes the property after her death; if she has no male issue, the nearest male heir will offer the oblations, and after her death, the property will go to the next heir of her father.[3]

3. The mother.

3. *The mother*, in consideration of bearing the child in her womb and nurturing him during his infancy, and also because she confers benefits on him by the birth of other sons, who may offer funeral oblations, in which he will participate.[4]

I 2

Digitized by Google

4. The grandmother.

4. **The grandmother inherits after the grandfather for the last reason.**[5]

According to the doctrine of the Benares and Mithila school, the females abovementioned inherit only, when the family *is divided.* In an undivided family females are not admitted as heirs. (See Sect. 164.)[6]

Whenever a female succeeds, she does not obtain a full proprietary right of the inheritance, but is only entitled to enjoy it under the guardianship of the next heir of the deceased. At her death the Estate, augmented or lessened does not go to her heirs, but to the nearest heir of the person from whom she received it who is in existence at the time of her decease.[7]

Sister do not inherit.

Sisters are not entitled to inherit (Sect. 178.)[8] Some commentators on the Mitacshara II. 4, 1, contend, that "sisters" succeed in failure of brothers, but this opinion is general rejected.[9]

1 Daya Bhaga, ch. xi. sect. 6, No. 11.

2 Daya Bhaga, ch. xi. sect. 1, No. 7, 43.

3 Daya Bhaga, ch. xi. sect. 2, No. 1, 19.

4 Daya Bhaga, ch. xi. sect. 4.

5 Daya Bhaga, ch. xi. sect. 4, No. 4.

6 Princ. Hindu, Law, vol. i. p. 22.

7 S. D. A. Rep. vol. i. p. 164, note vol. iii. p. 106. vol. iv. p. 310, 330. vol. v. p. 282. Daya Bhaga, ch. xi. sect. 1, No. 58, sect. 2, No. 15: Digest, book v. sect. 424, 515. Princ. Hindu Law, vol. ii. p. 209.

8 Princ. Hindu Law, vol. i. p. 26. Strange, vol. ii. p. 245.

9 Strange, vol. ii. p. 243.

Sons and grandsons cannot be disinherited without cause.

158. A father cannot disinherit his sons and grandsons without sufficient cause, as enmity, wickedness, &c.,[1] but by exhausting the estate by gifts and legacies,[2] he can actually make such disposals, as will amount to a disinheritance, and what he can do by gifts and legacies according to Hindu Law, he can now, in conformity with Reg. 5, 1799, Sect. 6, do by will. It is however not very likely, that a Hindu will disinherit his heir without good cause, as by so doing he will deprive himself of the spiritual benefit, he would otherwise obtain from the performance of his funeral ceremonies.

1 Nareda, Digest, book v. sect. 28 Mitacshara on inheritance, ch. i. sect. 2, No. 12.

2 Catyayana, "After delivering what is due as a friendly gift *promised by*

the father, let the remainder be divided among the heirs." Digest, book v. sect. 369; see also book i. sect. 195.

A conveyance of a perron's whole property to a brother is valid, though he has a wife. Taranee Churn *versus* M. Dassee Dossy, Sudder Dewanny Adawlut Rep. vol. iii. p. 397.

154. The Hindu Law distinguishes between ancestorial and self acquired property, so that ancestorial immoveable property cannot be sold without absolute necessity, nor distributed at the choice of the owner, who has sons, grandsons or great grandsons, without their consent; but the heirs and the order of succession are the same for moveable as for immoveable, for self acquired as for ancestorial property,[1] with the exception, that there are large landed Estates, which, according to local custom or family usage, are inherited by the eldest son alone. (Sect. 157.)

No difference in the order of succession between ancestorial and self-acquired property.

Exception.

The permission granted in Reg. 11. 1793, Sect. 6, to the owner of a landed Estate, of bequeathing the Estate to one heir in exclusion of other heirs, is only applicable to self-acquired property, or to ancestorial property, when the owner has no son, grandson or great-grandson, as the Regulation provides that the bequest must not be contrary to the Hindu Law.

1 Digest, book v. sect. 411 Mitacshara on Inheritance. ch. i. Sect. 1. No. 27. Colebrooke in Strange, vol. ii. p. 5.

2. *On the order of Succession in general.*

155. The order of succession to the property of a man and to the property of a woman differ, but all the schools agree in most parts with respect to both. In the following pages we shall therefore state the order of succession of Srikrishno in the Daya Crama-Sangraha, which is followed in Bengal, and note the differences which exist, according to the other schools.

Order of succession to males and to females differ, but all the schools agree to a great extent with respect to both.

A. *According to the Bengal School.*

156. The first class of heirs contains all *legitimate*[1] sons living in a state of union with their father at the time of his death,[2] who succeed equally[3] to his property, real and personal, ancestral and acquired.[4]

1. Sons.

1 Legitimate sons are now only those, who are born in marriage by persons of the same class: all the other kinds of sons (except the adopted) are abolished in the present age. Vrihaspati. W. Jones, Gen. Note to Menu. Digest, book v. sect. 279.

Digitized by Google

2 The mere living apart does not exclude a son from taking an equal share with his brothers, even of property acquired after his separation with the assistance of his brothers, if he has not received his share during his father's life time; but those who have contributed to the acquisitions are entitled to a double share (Sect. 202.) Princ. Hindu Law, vol. ii. p. 5, 7.

3 Sons take according to their number, not according to the number of mothers Sumrum Sing *versus* Khedun Sing, S. D. A. Rep. vol. ii. p. 116.

4 Daya Crama Sangraha, ch. i. sect. 1. Menu, book ix. sect. 104. Daya Bhaga, ch. ix. Princ. Hindu Law, vol. i. p. 17; vol. ii. p. 1. 6.

Right of primogeniture abolished.

157. In former times the right of primogeniture[1] prevailed to a certain extent, but that, with other usages, has been abolished in the present or Cali age.[2] In the succession of principalities[3] and large landed Estates, long[4] established Koolachar (family usage), or local custom, will convey the property to one son, to the exclusion of the rest.[5]

1 Menu, book ix. sect. 115, 117. Dewala Digest, book v. sect. 41. Gotama Digest, book v. sect. 51. Mitacshara on Inheritance, ch. i. sect. 3, No. 4.

2 Aditya Purana. Gen. Note to Menu. Daya Bhaga, ch. iii. sect. 2, No. 26, 27. "Persons of the present day, who are younger brothers, entertain not great veneration for their elder, equal distribution is accordingly alone seen in the world, as also, because elder brothers deserving of deducted allotments are now rare." The distinction between a virtuous and not virtuous son, is also abolished:" at present a third a part is allotted to a son given without inquiring his *good* or *bad*, qualities." Digest, book v. sect. 396. Mitacshara on Inheritance. ch. i. sect. 3. No. 4. Bojrub Roy *versus* Rusoomoey. S. D. A. Rep. vol. i. p. 27.

3 Zemindaries are considered tributary principalities. Colebrooke.

4 S. D. A. Rep. vol. v. p. 198.

5 Reg. II, 1793, Sect. 2. Cl. 6. Ben. Reg. 44, 1795, Sect. 2, Cl. 6; Reg. 10. 1800, Sect. 2; Reg. 12, 1850, sect. 36. Bemola Deby *versus* Goculnath, S. D. A. Rep. vol. i. p. 29, Koonwur Bodh Sing *versus* Seonath Sing, *ibid*, vol. iii. p. 92, Strange, vol. ii. p. 447.

Grandsons take by representation.

158. If among several sons, one or more is dead and has left sons or grandsons, they represent their father, or grandfather and take his share (they take per stirpes).[1] Thus, let there be two sons A. and B., and B dies leaving 3 sons, the Estate will be divided into two shares, of which A takes one, and the 3 sons of B. one among them.

1 Daya Bhaga, ch. ii. No. 9. 10; ch. iii. sect. 1, No. 21, 23. Yajnyawalcya, Digest, book v. sect. 78. Catyayana Digest, book v. sect. 79. Princ. Hindu Law, vol. i. p. 18.

Adopted son.

159. An adopted son, if he be the only son, takes the whole Estate, but, if he inherits with legitimate sons, he takes a one-third

Digitized by Google

share in Bengal, and a one-fourth in Benares, if adopted in the Dattaca or Kritima form, and one-half, if in the Dwyamustyana form.

Daya Crama Sangraha, ch. vii. No. 23. Princ. Hindu Law, vol. i. p. 70.

160. The illegitimate son of a man of the three first classes cannot inherit,[1] except when established by local usage,[2] but the illegitimate son of a Sudra by a female slave,[3] or other unmarried Sudra women,[4] takes half a share with his legitimate brothers, and may, by consent of the father, share equally with them. If there be no legitimate sons, the illegitimate son takes the whole estate, unless there be a daughter's son, when he is considered a coheir and takes an equal share.[5] The son of a Sudra begotten upon a woman of the higher classes, or upon a married woman, seems not entitled to inherit from his natural father.[6] Illegitimate sons.

1 Menu, book ix. sect. 178.—" A son, begotten through lust on a Sudra woman by a man of the priestly class, is even as a corpse, though alive, and is then called a living corpse (parasava)" Mitacshara on Inheritance, ch. i. sect. 12, No. 3.

2 Mohon Sing *versus* Chumun Roy, S. D. A. Rep. vol. i. p. 28.

3 Yajnyawalcya, Daya Crama Saugraha, ch. vi. No. 33. Mitacshara on Inheritance, ch. 1. sect. 12. Daya Bhaga, ch. ix. No. 29, 31. Menu, book ix. sect. 179.

4 The words " or other *unmarried* Sudra women" are only in the Daya Bhaga, ch. ix. No. 29; the other authorities mention only the female slave, which according to Chintamoni and Srikrishno includes the wife and concubine of a man's male slave. See Daya Bhaga, ch. ix. No. 29.

5 Daya Bhaga, ch. ix. No. 32. Daya Crama Sangraha, ch. vi. No. 35. Yajnyawalcya, Digest, book v. sect. 175. Princ. Hindu Law, vol. i. p. 18; vol. ii. p. 15. The Mitacshara admits also a daughter to take a share with him, ch. i. sect. 12, No. 2.

6 A son with a married woman was, by a fiction of law, considered to be the son of the husband of the wife, and not of the natural father, Digest, book v. sect. 271, and as such entitled to a share as the son of his mother's husband. Digest, book v. sect. 246, 219, but this and several other kinds of sons are obsolete in the present age (Sect. 156, Note 1,) and Menu declares even a son of an appointed wife (that is appointed by the husband to produce offspring for him) when begotten by impure desire, incapable of inheriting. Digest, book v. sect. 233.

161. In default of sons, the son's sons inherit by representation. Thus if a man has three sons, A. B. and C., who all die before the father; A. leaving 3 sons; B. 2 sons, and C. 1 son, the Estate is not divided into 6 shares according to the num- 2. Grandsons in default of sons.

Digitized by Google

ber of grandsons, but into 3, of which A's three sons take 1 among them; B's, two sons, 1; and C's only son takes 1.

Daya Bhaga, ch. ii. No. 9, 10; ch. iii. sect. 1, No. 21. Daya Crama Sangraha, ch. i. sect. 1. No. 3. Catyayana, Digest, book v. sect. 79.

3. Great grandsons take by representation.

162. If one son's son is dead, and has left sons, they take the share of their father, (Sect. 158,) and in default of son's sons, the son's grandsons inherit, each taking the share of him they represent, as above.[2]

During the life time of their parents neither the son's son, nor the son's grandson inherit, since they do not confer any benefit upon the deceased by the presentation of the funeral offerings.[3]

Grandson's grandson inherits amongst remote kindred

The great great grandsons are not admitted as Sapinda, but as remote Kindred. (Sect. 179, No. 43; see also Sect. 145.)

[2] Daya Crama Sangraha, ch. i. sect. 1., No. 3. Daya Bhaga, ch. iii. sect. 1, No. 18. Digest, book v. sect. 78.

[3] Daya Crama Sangraha, ch. i. sect. 1, No. 4. Daya Bhaga, ch. iii. sect. 1. No. 19.

4. The widow.

163. In default of a son, son's son and son's grandson in the male line, the widow succeeds to the Estate, whether the husband was separated, or living as a member of an undivided family.[1] If there be more than one widow, their rights are equal; the right is considered as vested only in one individual, so that the property does not go to the heirs of the husband until after the death of *all the* widows.[2]

The widow of a deceased son.

The widow of a son who died before his father, is of course not entitled to inherit, she could only claim in right of her husband, and he not being in existence at the time of succession cannot have any right.[3]

According to the Benares and Mithila schools.

According to the school of Benares and Mithila, the widow succeeds only when her husband was separated from his coheirs. When the deceased was living as a member of an undivided family, an undivided brother is held to be the next heir, and the widow is only entitled to maintenance.[4]

[1] According to the authority of Catyayana, Yajnyawalcya, and others, Daya Crama Saugraha, ch. ii. sect. 2. Daya Bhaga, ch. xi. sect. 1, Nos. 19, 44, 56. Mitcshara on Inheritance, ch. ii. sect. 1, No. 2. Digest, book v. Sect. 398.

[2] Princ. Hindu Law, vol. i. p. 19. vol. ii. p. 37. Halhed's Gentoo Law, p. 30. When the Daya Bhaga, (see also Digest book iv. s. 49; book v. s. 414,) gives preference to the widow of the same class as her husband, regard is had to marriages with wives of different classes, but these marriages are abolished in the

Digitized by Google

present age. Strange, vol. i. p. 137, gives preference to the widow, who was first married, being the one who is considered to have been married from a sense of duty, and admits the others to succeed in their return as they servive, entitled however to be maintained by the first.

3. Princ. Hindu Law. vol. ii. p. 107, 117. Ayabutee *versus* Rajkissen Shah, S. D. A. Rep. vol. iii. p. 28. Rai Sham Bhullub *versus* Prankissen Ghose, ibid, iii. p. 33.

4. According to the authority of Sancha Lichita, Nareda and others, see Daya Bhaga, ch. xi. sect. 1, Nos. 19, 50, Mitacshara on Inheritance, ch. ii. sect. 1, Nos. 7, 30. Menu, book ix. sect. 217. Digest, book v. sect. 403 seq. Gyan Koonwur *versus* Dookhurn Sing, S. D. A. Rep. vol. iv. p. 330. Princ. Hindu Law. vol. ii. p. 23, 28.

Causes of the restricted right of the widow.

164. Though the widow is said to be admitted as an heir in consideration of the assistance rendered by her to her husband in the performance of his religious duties, (Sect 152, No. 1,) the real cause of her admission seem to be her right to maintenance (Sect. 149,) and the injustice which would take place, if she should become dependant for her maintenance upon the distant relatives of her husband and not have preference over them in the distribution of his wealth for the performance of ceremonies for his spiritual benefit, in which she is a partaker.[1] But, on the other hand, the widow, as a female, is not a proper heir, and is unfit to perform ceremonies; and her sex as well as her worldly inexperience expose the property to destruction without benefit to the deseased. To protect these different interests the Law provides:

1st. That the widow shall only have *the use* of the property; 2ndly. that her husband's kindred shall be her guardians, and 3rdly. that the next of kin to the husband shall take his property after *her* death. The enjoyment of the property is given her upon two conditions; 1. that she remains chaste; 2. that she does not make waste. It is in the same spirit that the Benares school admits a widow as heir *only* when her husband was separated; as long as brothers live united, friendship and cordiality may be presumed, and a separate provision for the widow of the deceased becomes therefore unnecessary, but not so, when the family has been divided; her support requires then to be secured.[2]

1 Mitacshara on Inheritance, ch. ii. sect 1. No. 31.
2 Princ. Hindu Law, vol. i. p. 19.

195. The widow is thus in her right as wife *entitled* to enjoy The Widow is

Digitized by Google

entitled to enjoy the property and bound to apply it for the spiritual benefit of her husband.

the property of her deceased husband, and as heir bound to apply it for his spiritual benefit, (Sect. 150.) Generally, she cannot make gifts, or sell or mortgage the property, because after her death the property is to go to the next heir of her husband,[1] but when a sale or mortgage becomes necessary for any indispensible duty, religious or secular,[2] or for her maintenance,[3][4] is it valid, because duties *must* be performed, and she has a right to her maintenance from the property; and whenever gifts are made, or the property is sold or mortgaged, for the spiritual benefit of her husband, it is valid, because the heir takes the wealth for that purpose and not for his own benefit. (Sect. 149.) As the spiritual benefit of the deceased and his ancestors is promoted not only by the funeral oblations made by her, but also by the rites performed by his relatives, in which he becomes a partaker, she is directed to make presents to the paternal uncles and other relatives of the deceased in proportion to her wealth for the sake of *his* funeral rites.[5] The payment of his debts is a moral as well as a legal duty;[6] and the marriage of an unmarried daughter is a moral duty,[7] which after his death, devolves upon his wife;[8] whatever is done necessarily for these purposes is consequently valid.

1 Pokhanarain Mohun Lal *versus* M. Seesphool, S. D. A. Rep. vol. iii. p. 114

2 Prannath Roy *versus* Raja Gobindo Chunder Roy. S. D. A. Rep. vol. v. p. 37.

3 Daya Crama Sangraha, ch. i. sect. 2, No. 6. Daya Bhaga, ch. xi. sect. 1, No. 62.

4 Ramchunder Surma *versus* Gunga Gobindo Banurjee, S. D. A. Rep. v. iv. p. 117.

5 Dava Crama Sangraha, ch. i. sect. ii. No. 7. Daya Bhaga, ch. xi. sect. 1, No. 63.

6 The debts must of course be proved, her acknowledgment is not sufficient; and only that portion which is necessary can be sold, and the price must agree with the real value. Hemchand Mujmodar *versus* Tara Money and Rai Money, S. D. A. Rep. vol. i. p. 359.

7 "The widow should give to an unmarried daughter a fourth part out of her husband's Estate, to defray the expenses of the damsel's marriage. Since sons are required to give that allotment, much more should the wife or any other successor, give a like portion." Daya Bhaga, ch. xi. sect. 1, No. 66.

8 Daya Bhaga, ch. ix. sect. 2, No 7.

Validity of alienations by a widow depends upon circumstances.

166. The validity of a gift, a mortgage or a sale, must therefore be determined by its peculiar circumstances. In the disposal of property by gifts or otherwise,[1] the widow is subject to the control

Digitized by Google

of her husband's family,[2] and the only general rule laid down by the law is : "let not a wife make waste of her husband's property"[3] and by "waste" is meant "expenses unproductive of benefit to the owner of the property."[4] Gifts to her own family do not of course produce any such benefit, unless they should come within the general nature of alms, and are therefore invalid if made without the consent of her husband's kindred.[5]

1 The Retnacara and Vivada Chintamoni contend, that she can give away *moveable* property, but this is explained as being restricted to ornamental apparel, though not given by her husband, which she ought to preserve during his life-time, but may give away after his death. Digest, book v. sects 402, 478.

2 Nareda, Daya Bhaga, ch. xi. sect. 1, No. 64. The husband's heirs within the degree of Sapindas (Sect. 150) in default of them, her own father. M. Bhuwany Moey *versus* M. Solukhus, S. D. A. Rep. vol. i. p. 322. Gookulchand Chuckerbuty *versus* Rai Ranee, ibid, vol. ii. p. 167.

According to a decree of the Supreme Court in Calcutta a widow has an uncontrolled right to dispose of the annual income, Consid. Hindu Law, p. 22, but this is not in conformity with the spirit of the Hindu Law.

3 Dana Bharna, "for women, the heriditage of their husband is declared applicable to use. Let not woman on any account make waste of their husband's wealth." Daya Crama Sangraha, ch. i. sect. 2, No. 5, Daya Bhaga, ch. xi. sect. 1, No. 60. Mahabharata, Digest, book v. sect. 402.

4 Daya Crama Saugraha, ch. i. sect. 2, No. 5. Daya Bhaga, ch. xi. sect. 1. No. 61. Gifts to a stranger are invalid, Mohun Lal Khan *versus* Ranee Siroomunnee, S. D. A. Rep. vol. ii. p. 32.

5 Daya Bhaga, ch. xi. sect, 1, No. 64.

Widow should reside in her husband's family.

167. A widow is to reside in her husband's family,[1] yet as she forfeits her right to the porperty only by not remaining chaste, or by making waste, the mere residing with her own family cannot cause a forfeiture of her right the to enjoyment of the property, if it is not done for unchaste pusposes.[2]

1 Catyayana : "Let the childless widow preserving unsullied the bed of her lord, and abiding with her 'venerable protector,' enjoy with moderation the property until her death ; after her, let the heirs take it." See Daya Crama Sangraha, ch. i. sect. 2, No. 4. Lichita ; "yet, if afflicted by disease and in danger of her life, she may go to her own kinderd." Digest, book v. sect. 481.

2 Consid. Hindu Law. p. 14, 95.

5. The Daughter.

168. In default of the widow the legitimate daughter succeeds ;[1] first the maiden daughter,[2] to the exclusion of other daughters, then the daughter who has, and the daughter who is likely to have male issue, together.[3]

If the *maiden* daughter after having succeeded to her father's

Digitized by Google

property marries and dies leaving sons, they succeed exclusively to the estate of their grandfather to the exclusion of other daughters and daughter's son's ;[4] but if she dies without male issue, the Estate goes to the other description of daughters, and on the decease of one of them, whether they have male issue or not, the estate devolves on the surviving daughter ;[5] and it is not till after the death of all these daughters that the Estate goes to the next heir of the father. (Sect. 152.) As the daughter does not inherit on account of relationship, but of the benefit she confers on the deceased by continuing the line of succession, (Sect. 152,) the daughter who is either barren, or the widow who is destitute of male issue, or the mother of daughters only, can never inherit.[6]

Barren daughters and widows destitute of male issue or only mothers of daughters do not inherit.

1 Daya Crama Sangraha, ch. i. Sect. 3, No. 1. Daya Bhaga, ch. xi. sect. 2, No. 4. Digest. book v. sect. 420.

2 Chintamoni and Srikrishno (Daya Bhaga, ch. xi. sect. 2, No. 4,) content that a daughter verbally *betrothed* is included in the term "married," but this doctrine is not concurred in by any other authority and is declared untenable by the author of the Daya Rushaya. Princ. Hindu Law, vol. i. p. 21 ; vol. ii. p. 44.

3 Daya Crama Sangraha, ch. i. sect. 3. Nos. 2 to 4. Daya Bhaga, ch. xi. sect. 2. Nos. 3, 8. Digest, book v. sect. 418.

4 Princ. Hindu Law, Vol, i. p. 24. Bijia Deby *versus* Unnapoorna Deby. S. D. A. Rep. vol. iii. p. 26.

5 Daya Crama Sangraha, ch. i. sect. 3. Nos. 2, 3. Daya Bhaga, ch. xi. sect. 2, No. 30. Rai sham Bhullub *versus* Prankissen Ghose, S. D. A. Rep. vol. v. p. 21.

6 Daya Crama Sangraha, ch. i. sect. 3. No. 4. Daya Bhaga, ch. xi. sect. 2. Nos 3, 8.

The indigent daughters preferred according to the the Benares school.

169. According to the Benares school, the maiden daughter is first entitled to succeed ; then the *indigent* married daughters, and last the *wealthy* married daughters, and no preference is given to the daughter who has or is likely to have male issue over a daughter, who is barren, or a chidless widow.

Princ. Hindu Law, vol. i. p. 22. Mitacshara on Inheritance, ch. ii. sect. 4.

But not according to the Mithila school.

170. According to the school of Mithila, the unmarried daughter is preferred to one who is married, and failing her, all married daughters are entitled to inherit. No difference is made whether she has or is likely to have issue, or is a widow, or is barren, or whether she is indigent, or wealthy.

Princ. Hindu Law, vol, 1. p. 22.

Daughters enjoy only the property.

171. As the daughter's right to succeed is inferior to that of the widow, it necessarily follows that she too is only to enjoy the

Digitized by Google

property, and that she is subject to the same restrictions in the use of it as the widow, (Sect. 163-165.) A gift by her to her son on account of his filial piety, is valid.[2] On her death, the Estate goes to her father's next heir. (Sect. 152.)[3]

1 Daya Bhaga, ch. xi sect. 2, No. 81. Digest, book v. sect. 420. Gyan Koonwur *versus* Dookhun Sing, S. D. A. Rep. vol iv. p. 330.

2 Digest, book v. sect. 360.

3 If she should have adopted a son with her husband's consent, he does not become heir to such property; he has become a member of her *husband's* family, not of her father's. Gunga Moey *versus* Kissen Kishor Chowdry, S. D. A. Rep. vol. iii. p. 128.

172. In default of qualified daughters, the daughter's son inherits. If there be sons of more than one daughter, they share equally.[1] — 6. The Daughter's son.

According to the Mithila school, the daughter's sons inherit first after the gentiles, cognates, a pupil and fellow student.[2]

1 Daya Crama Sangraha, ch. i. sect. 4. Daya Bhaga, ch. xi. sect. 2. Nos. 25, 29. Mitacshara on Inheritance, ch. ii. sect. 6. Vrihaspati, Digest, book v. sects. 411, 421. Ramdhun Shen *versus* Kissencanto Shen, S. D. A. Rep. vol. iii. p. 100. There is no right of representation here, as when a son's son succeeds, the reason of which is, that daughter's sons inherit as grandsons, not as the heirs of their mother.

2 See Daya Crama Sangraha, ch. i. sect. 4 No. 3, Daya Bhaga, ch. xi. sect. 2, Nos. 27, 28. Princ. Hindu Law, vol. i. p. 23. S. D. A. Rep. vol. iv. p. 333.

173. In default of the daughter's son, the father inherits;[1] according to the Benares and Mithila school, the mother succeeds in default of the daughter's son to the exclusion of the father.[2] — 7. The Father.

1 Catyana, Daya Crama Sangraha, ch. i. sect. 5. Daya Bhaga, ch. xi. sect. 3. Digest book v. sect. 424.

2 Daya Crama Sangraha, ch. i. sect. 5, No. 2. Daya Bhaga, ch. xi. sect. 4, No. 3. Note. Mitcshara on Inheritance. ch. ii. sect. 4, No. 2. Princ. Hindu Law, vol. i. p. 25; vol. ii. p. 54. Note.

174. In default of the father, the mother inherits;[1] the stepmother, having not borne the deceased in her womb, does not inherit.[2] The mother only enjoys the property, as other female heirs. (Sect. 152.[3]) — 8. The Mother.

1 Vishnu, Daya Crama Sangraha, ch. i. sect. 6. Daya Bhaga, ch. xi. sect. 4. Digest, book v. sect. 424.

2 Daya Bhaga, ch. xi. sect. 6, No. 3. Narain Deby *versus* Hurkrishno Ray, S. D. A. Rep. vol. i. p. 89. Lucky Priya *versus* Bhoyrub Chunder Chowdry, ibid, vol. v. p. 316, see also ibid, vol. i. p. 42. Note. Princ. Hindu Law, vol. ii p. 62.

3 Daya Bhaga, ch. xi, sect. 4, No. 7. Note Digest, book v. sect. 424.

Digitized by Google

9. The Brother.

175. In default of the mother, brothers inherit; first, the uterine associated brethern; next, the uterine unassociated brethern; then, the associated brethern of the half blood, and lastly, the unassociated brethern of the half blood. The succession takes place in this order, when the deceased had only uterine, or only half brothers, and either all were united, or all separated;[1] but if the uterine brother is separated, and the half brother associated or re-united, these two will inherit in equal shares.[2]

1 Yajnyawalcya, Daya Crama Sangraha, ch. i. sect. 7. Daya Bhaga, ch. xi. sect. 5. Mitacshara on Inheritance, ch. ii. sect. 4 Digest, book v. sect. 422.

2 Daya Crama Sangraha, ch. i. sect. 7. No. 4. Daya Bhaga, ch. xi. sect. 5, No. 15.

10. The Brother's son.

176. In default of brothers, brother's sons succeed in the same order as brothers; (Sect. 175,)[1] they take according to numbers,[2] and not by representation as grandsons, (Sect. 158.) Brother's sons are totally excluded by the existence of brothers, but when a brother has once succeeded, his share devolves of course on his death on his sons, and not on his surviving brothers, even though he happens to die before a partition of the Estate takes place.[3]

1 Vishnu, Daya Crama Sangraha, ch. i. sect. 8. Daya Bhaga, ch. xi. sect. 6, No. 1. Mitacshara on Inheritance, ch. ii. sect. 4, No. 7. Digest, book v. sects. 422, 431.

2 The reason is, that they do not inherit in right of their father, but in their own right, and as their right is equal, their share must also be equal. Mitacshara on Inheritance, ch. ii. sect. 4. No. 7. Note.

3 Mitacshara on Inheritance, ch. ii. sect. 4. No. 9.

11. The Brother's grandson.

177. In default of brother's sons, brother's grandsons succeed in the same order as brothers; they also take according to numbers.[1]

Brother's great grandson does not inherit.

Brother's great-grandsons do not inherit since they do not confer any benefit on the deceased, being in the fourth decree of relationship (Sect. 149.)[2]

Nor Brother's great grandson according to the Benares and Mithila school.

According to the school of Benares and Mithila, the brother's grandson is not enumerated in the order of heirs, the paternal grandmother succeeds after the brother's son.[3]

1 Daya Crama Sangraha, ch. i. sect. 9. Daya Bhaga, ch. xi. sect. 6, No. 6. Digest, book v. sect. 424.

2 Daya Crama Sangraha, ch. i. sect. 9. No. 2. Daya Bhaga, ch. xi. sect. 6, No. 7.

3 Mitacshara on Inheritance, ch. ii. sect. 5, No. 1.

12. The Father's daughter's son.

178. In default of brother's grandsons, the father's daughter's son succeeds, because he presents three funeral oblations to the an

cestor of the deceased.[1] Sons of different sisters take according to numbers, born as well as unborn, and even unbegotten at the time of their uncle's death,[2] and without any difference between the full and half blood.[3]

If he deceased has left a sister on the father's side likely to produce male issue, the succession is, according to the opinion of some, kept in abeyance, and the sister enters on the succession in trust for such issue, in preference to the paternal uncle's son.[4] But according to the opinion of others, which seems the correct one, the sister is not entitled to take possession of the Estate in trust for her *unbegotten* son, and even the son begotten *after* the death of the inheritee, is excluded by the more distant heir, in existence. The estate is according to their opinion always inherited by the *nearest* heir in *existence* at the death of the inheritee, and father's daughter's unbegotten sons are only admitted as heirs, when the Estate *has been* inherited by a father's daughter's son.[5]

According to the school of Benares and Mithila, the paternal grandmother succeeds after the brother's son, and the sister's sons are excluded, as they belong to a different family. (Sect. 176.)

[1] Daya Crama Sangraha, ch, i. sect, 10, No. 1. Daya Bhaga, ch. xi. sect. 6, No. 8.

[2] *Bijia* Deby *versus* Unnapoorna Depy, S. D. A. Rep. vol. i. p. 162. M. Solookhna *versus* Ramdolal Pande, ibid, i. p. 324.

The opinion that a sister's *unbegotten* son succeeds, is said to be analogous with the succession of a daughter's son. The daughter takes the inheritance, thought it properly belongs to the daughter' s son, who performs the obsequies; and the daughter's sons first get the Estate at the death of their mothers and succeed, *though unbegotten* at the time of their grandfather's death; so also in the case of succession of the father's daughter's son, see S. D. A. Rep. vol. v. p. 45

[3] Princ. Hindu Law, vol. ii. p. 86.

[4] Koruna Mai *versus* Joy Chunder Chose, S. D. A. Rep. vol. v. p. 42. Kissen Lochun Rose *versus* Tareney Dassy, ibid, vol. v. p. 55

[5] Lucky Priya *versus* Bhoyrubchunder Chowdry, S. D. A. Rep. vol. v. p. 315 See also vol. v. p. 44. Note.

179. In default of the father's daughter's son the succession is thus continued agreeably to the doctrine of the Bengal school.[1] The rest succeed in the following order according to the Bengal school.

13. Brother's daughter's son.
14. Paternal grandfather.
15. Paternal grandmother.

Digitized by Google

16. Paternal uncle.
17. Paternal uncle's son.
18. Paternal uncle's grandson.
19. Paternal grandfather's daughter's son.
20. Paternal uncle's daughter's son.
21. Paternal great-grandfather.
22. Paternal great-grandmother.
23. Paternal grandfather's brother.
24. His son.
25. His grandson.
26. Paternal great-grandfather's daughter's son.
27. His brother's daughter's son.

One the failure of all these, the inheritance goes to the maternal line.

28. The maternal grandfather.
29. Maternal uncle.
30. His son.
31. His grandson.
32. His daughter's son.
33. Maternal great-grandfather.
34. His son.
35. His grandson.
36. His great-grandson.
37. His daughter's son.
38. The maternal great great-grandfather.
39. His son.
40. His grandson.
41. His great-grandson.
42. His daughter's son.

43. 44. In default of all these, the property goes to the remote kindred (Saculya) in the descending and ascending line, as far as the fourteenth in degree, first the descending (the great-grandson's son, &c.) then the ascending (the great-grandfather's father, &c.)

45. Then to the spiritual preceptor (the Acharjya, that is, to him who invests the pupil with the sign of his class, and not the Gooroo.[2]

46. The Pupil.

Digitized by Google

47. The fellow student of the Veda.

48. Persons bearing the same family name, being inhabitants of the same village.

49. Persons descending from the same patriach, being inhabitants of the same village.

50. Brahmins learned in the Vedas, being inhabitants of the same village.

51. The ruling power, with the exception of the property of a Brahmin, which never can escheat, but must be distributed among other Brahmins.

[1] Daya Crama Sangraha, ch. i. sect. 10. No. 2 to 34. Daya Bhaga, ch. xi. sect. 6, No. 11 to 34. Yet the above order is not acceded to by all the writers of the Bengal School. Jugunatha (Digest, book v. sect. 434,) puts the son's daughter's son (No. 32,) and the grandson's daughter's son (No. 37,) before the maternal grandfather (No. 28.) Princ. Hindu Law, vol. i. p. 29, 31.

[2] Digest Book v. sect. 439. Princ. Hindu Law, vol. ii. p. 100.

B. *Order of succession, according the Benares and Mithila School.*[1]

The order of succession according to the Benares and Mithila school.

180. 1—3. The son, son's son and son's grandson, (Sect. 156—162.)

4. The widow, if the deceased was separated, otherwise she is only entitled to maintenance. Mitacshara on Inheritance, ch. ii. sect. 1. (Sect. 163.)

5. The daughters; first the maiden daughter, then the married indigent, lastly, the married wealthy daughter; ibid, ch. ii. sect. 2. (Sect. 169, 170.)

6. The daughter's son;[1] ibid, ch. ii. sect. 2, No. 6. (Sect. 172.)

7. The mother; ibid, ch. ii. sect 3, No. 1. (Sect. 174.)

8. The father; ibid, ch. ii. sect. 3, No. 5. (Sect. 173.)

9. The brother; first, the brother of the whole blood; then of the half blood; ibid, ch. ii. sect. 4, (Sect. 175.)

10. Their sons in the same order; ibid, ch. ii. sect. 4, No. 7, (Sect. 176.)

[1] See Mitacshara on Inheritance. Princ. Hindu Law, vol. i. p. 33. The author enumerates the paternal great grandfather's parents among the Sapindas but these belong to the distant kindred, (Sect. 150.)

Digitized by Google

11. The paternal grandmother; ibid, ch. ii. sect. 5, Nos. 1, 2.

12. The paternal grandfather; ibid, ch. ii. sect. 5, No. 3.

13. The paternal uncles, first of the whole blood, then of the half blood; ibid, ch. ii. sect. 5, No. 4.

14. Their sons in the same order; ibid, ch. ii. sect. 5. No. 4.

15. The paternal great-grandmother; ibid, ch. ii. sect. 5, No. 5.

16. The paternal great-grandfather; ibid, ch. ii. sect. 5, No 5.

17. His son; ibid, ch. ii. sect. 5, No. 5.

18. His grandson; ibid, ch. ii. sect. 5, No. 5.

19. His great-grandson.

20. In default of these (the Sapindas), the paternal relatives succeed in the same order as far as the fourteenth in degree, (the Samanodecas,) ibid, ch. ii. sect. 5, No. 6.

21. In default of the Samanodecas, the Bundhoos or cognates succeed; 1st. the son of *his own* father's sister; 2nd. the son of *his own* mother's sister; and 3d. the son of *his own* maternal uncle; then, 4th. the son of *his father's* paternal aunt; 5th. the son of *his father's* maternal aunt; 6th. the son of *his father's* maternal uncle; 7th. the son of *his mothers* paternal aunt; 8th. the son of *his mothers* maternal aunt; and 9th. the son of *his mothers* maternal uncle; ibid, ch. ii. sect. 6.

22. In default of kindred, the spiritual preceptor; ibid, ch. ii. sect. 7, No. 1.

23. The pupil; ibid, ch. ii. sect. 7, No. 1.

24. The fellow student of the Veda; ibid, ch. ii. sect. 7, No. 2.

25. Learned Brahmins; ibid, ch. ii. sect. 7, No. 3; Menu, book ix. sect. 188.

26. The ruling power, with the exception of the property of a Brahmin, which must be given to other Brahmins; Mitacshara on Inheritance, ch. ii. sect. 7, No. 5.

1 The Vivada chandra, the Vivada Ratnacara and Vivada chintamoni—authorities current in Mithila—do not enumerate daughter's sons among the series of heirs.

3. *On the Succession to the property of a Devotee, &c.*

Heirs to the property of a devotee.

181. The goods of an anchorite, a hermit (Yati or Sunyasi) and of a professed perpetual student, are taken by the spiritual

brother, the virtuous pupil and the holy preceptor, and in failure of them by a person belonging to the same order.

Daya Crama Sangraha, ch. i. sect. 10, No. 85. Daya Bhaga, ch. xi. sect. 6, No. 37, Mitacshara on Inheritance, ch. ii. sect. 8. Digest, book v. sect. 458

182. The successor to the office of Mohunt of religious orders of Sunyasis or Gossains, is he, whom the Mohunt has appointed, and who has been installed by the assembly for performing his funeral obsequies;[1] if none has been appointed, the Khaschella—principal pupil—is the successor.[2] Successor of the office to Mohunt.

1 Dhunsing Ghir *versus* Mya Ghir. S. D. A. Rep. vol. i. p. 153.
2 Gunes Ghir *versus* Amrao Ghir. S. D. A. Rep. vol. i. p. 218.

4. *Order of Succession to a Woman's peculiar Property.*

183. In distributing the property in the possession of a woman at her death, regard must be had to the manner in which she has obtained possession thereof; thus:

1st. Property *inherited* from a husband, father, son or grandson goes at her death to the next heir of the husband, father, son or grandson in existence at *her* death. (Sect. 152). The same is the case with any increase or accumulation from such property during her possession, as she is only entitled *to the use* of such property, (Sect. 164, 165).[1] Property inherited as widow, daughter, mother and grandmother.

2nd. Property taken by a childless wife on a partition by the father in his life-time among his sons, (Sect. 266) or by a mother on a division among her sons of the patrimonial estate after their father's death, (Sect. 199) goes, as far as it may be in existence or undisposed of at her death, (Sect. 270) to those, or to the legal heirs of those, from whose inheritance it was taken, because the property was given her only *for* her maintenance, and is not enumerated among the different acquisitions of a woman termed Streedhun (Sect. 184). Property taken by a childless wife on a partition by husband, or by mother on partition among sons.

3rd. Property *inherited* from her *mother* as her mother's Streedhun, (Sect. 186) goes to *her* heirs in the same order of succession as for males (Sects. 156 to 180), because this acquisition is not by law included in what is termed "Streedhun." The sons will thus inherit this property in preference to daughters, and a brother in preference to a childless widowed daughter.[2] Property inherited by a daughter as her mother's Streedhun.

Digitized by Google

According to the Benares and Mithila school, such property is considered as Streedhun and inherited as such.[3]

Property acquired as her own Streedhun,

4th. Property received as gifts or the like from her husband or kindred before, during, or after her marriage, and termed by the law Streedhun, goes to her heirs in an order which differs from the order of succession to other property.

1 Princ. Hindu Law, vol. ii. p. 259.

2 Prankissen Sing *versus* M. Bhagabutty. S. D. A. Rep. vol. i. p. 3. Princ. Hindu Law, vol. i. p. 38.

3 Mitacshara on Inheritance, ch. ii. sect. 11, No. 2. Digest, book v. sect. 515.

Streedhun what?

184. The different kinds of acquisitions included by law in the term "Streedhum," may for all practical purposes be included under the above explanation, viz., gifts or the like from her husband or kindred before, during, or after her marriage.[1] Gifts to a married woman from a *stranger*, that is to say, from other persons than her husband and kindred, and *not* made at the time of her marriage, belong to the husband's estate, and are considered as *his* property; and so are all her acquisitions by the practise of any mechanical art, as spinning, weaving, and the like;[2] but what she acquires by her own exertions in a state of widowhood, belongs of course to her *own* property.

Gifts from strangers.

Self acquisitions.

Ornaments worn by the wife.

Ornaments worn by her during her husband's life time, and not distinctly given to her by her husband, are not considered her property as long as he lives, but become so at his death, if she survives him, and are afterwards inherited as Streedhun.[3]

1 Menu, ch, 9, sect. 194. Daya Crama Sangraha, ch. ii. sect. 2. Daya Bhaga ch. iv. sect. 1. Mitacshara on Inheritance, ch. ii. sect. 11. Digest. book v. sect. 461, seq. princ. Hindu Law. vol. i. p. 37.

2 Catyayana, Daya Bhaga, ch. iv. sect. 1, No. 20. Digest, book v. sect. 470. Devala mentions "her gains," among her own property. Daya Crama Sangraha, ch. ii. sect. 1, No. 16.

3 Digest, book v. sect. 473. Mitacshara on Inheritance, ch. ii. sect. 11, No. 33, ch. i. sect. 3, No. 6, note.

The order of succession to Streedhun varies.

185. The succession to Streedhun varies according to the condition of the woman and the means by which she became possessed of the property.

1. If deceased is a maiden.

1st. If the deceased was *unmarried*, the heirs are: 1. her brother; 2. her mother; 3. her father,[1] and failing these, her nearest

paternal kindred.[2] But that which has been given by a bridegroom to her, is to be returned to him.[3]

1 Day Crama Sangraha, ch. ii. sect. 1. No. 1. Daya Bhaga. ch. iv. sect. 3, No. 7.

2 Princ. Hindu Law, vol. i. p. 38.

3 Nareda, Daya Crama Saugraha, ch. ii. sect. 1, No. 2. Digest, book v. sect. 510. On paying the charges on both sides, Mitacshara on Inheritance, ch. ii. sect. 11. No. 29.

186. 2nd. If the deceased was *married*, and the property was given to her at the time of her nuptials, (Yautuca) the heirs are:

2. If married, and the property was given to her at the time of her nuptials.

1. The daughters in the following order; 1. the maiden; 2 the betrothed; 3. the married daughter who has or is likely to have male issue; and lastly the barren and widowed daughters collectively.[1] After the death of a maiden or betrothed daughter on whom the inheritance *had devolved*, and who proved barren, or on the death of a widow, who has not giving birth to a son, the succession to the property, which they had so inherited, will devolve next on the sisters having and likely to have male issue, and in their default, on the barren and widowed daughter.[2] The daughter of a contemporary wife is also admitted.[3]

2. The son.[4]
3. The daughter's son.[5]
4. The son's son.
5. The son's grandson.
6—8. The son of a contemporary wife, her grandson and great-grandson.

In default of all these descendants,[6] supposing the marriage to have been celebrated according to any of the five first forms—Brahma, Daiva, Arsha, Gundharva or Prajapatya—the succession goes to:

9. The husband.
10. The brother.[7]
11. The mother.
12. The father.

But if the marriage has been celebrated according to any of the three last forms—Peisacha, Rakhusu, or Asura—the succession goes to:

Digitized by Google

9. The mother.
10. The father.
11. The brother.
12. The husband.

In default of these, the heirs are successively as follows:[8]

13. The husband's younger brother.
14. The husband's brother's son.
15. The sister's son.
16. The husband's sister's son.
17. The brother's son.
18. The son-in-law.
19. The father-in-law.
20. The husband's elder brother.

21. Then the next Sapinda, and in default of Sapindas the Saculyas, (Sect. 111.)

22. Failing them, the property of a Brahmini will go to learned Brahmins of the same village, and of other casts to the ruling power.

1 Daya Crama Sangraha, ch. ii. sect. 3. Daya Bhaga, ch. iv. sect. 2, No. 13. Digest, book v. sect 485. seq. According to the Benares and Mithila school the numarried daughter is preferred to the married ; the indigent to the wealthy. Mitacshara, ch. ii. sect. 11, No. 13. ch. i. sect. 3, No. 11.

2 Daya Crama Sangraha, ch. ii. sect. 3, No. 6. Daya Bhaga, ch. iv. sect. 2, No. 9.

3 Mitacshara on Inheritance, ch. ii. sect. 11, No. 22. Princ. Hindu Law vol. ii. p. 68.

4 According to the Benares and Mithila school, the daughter's daughter succceds in failure of daughters, Mitacshara on Inheritance, ch. ii. sect. 11, Nos. 12, 15, and takes by representation, ch. ii. sect. 11, No. 16, see also Menu, book ix. p. 193 ; then the daughter's son; ibid, ch. ii. sect. 11. No. 18; then the son. The daughter's daughter gets no share according to the Bengal school, but it is fit, says Menu, that something should be given to her. Digest, book v. sect. 498.

5 Daya Bhaga, ch. iv. sect. 2, No. 17, prefers the son of a contemporay wife to a daughter's son, but this opinion is rejected by Sri. Krishno and other good authorities. Daya Crama Sangraha, ch. ii. sect. 3, No. 12. Daya Bhaga, ibid, note. Princ. Hindu Law, vol. i. p. 39, uote.

6 Daya Crama Sangraha, ch. ii. sect. 3, No. 14. Daya Bhaga, ch. iv. sect. 3, Menu, book ix. sect. 196. Digest, book v. sect. 501.

7 Yajnyawalcya, Daya Crama Sangraha, ch. ii. sect. 3, No. 15. Daya Bhaga ch. iv. sect. 3, Nos. 13, 14, 27. Digest. book v. sect. 501.

8 Daya Crama Sangraha, ch. ii. sect. 6. Daya Bhaga, ch. iv. sect. 3. No. 36, seq.

Digitized by Google

187. 3rd. When the deceased was married and the property was *not* given to her at the time of her nuptials, (anwadheya),

3. If married and the property was *not* given her at the time of her nuptials.

a, if given by her father,

A, if given by her father.

The order of succession is the same as in the case of property received at nuptials.[1] (Sect. 186.)

b, if *not* given by her father: the order is the following:[2]

B, if not given by her father.

1. The son and unmarried daughter together; on the death of either of them, the property goes to the other. (As with daughters, Sect. 186, No. 1.)

2. The married daughters who have or are likely to have made issue.

3. The son's son.

4. The daughter's son.

5. The son's grandson.

6—8. The son of a contemporary wife, and failing him her grandson and son's grandson.

9. The barren and widowed daughters together:

Failing them the succession continues in the order as above. Sect. 186, from No. 9.[3]

[1] Daya Crama Sangraha, ch. ii. sect. 5. Daya Bhaga, ch. iv. sect. 2. No. 16.

[2] Daya Crama Sangraha, ch. ii. sect. 4. Menu, book ix. sect. 139. Daya Bhaga, ch. iv. sect. 2.

[3] Raghanundana holds, that the husband alone has a right to the property of his wife dying without issue bestowed on her by him after marriage; and that the brother has in such case the prior right to any property which may have been given to her by her father and mother, Princ. Hindu Law, vol. i. p. 40, Yajnyawalcya, Digest, book v. sect. 508, 509.

5. *On Impediments to Inheritance.*

188. As inheritance is bestowed in consideration of the benefit conferred on the deceased and his ancestors by the payment of his debts and the performance of funeral offerings, (Sects. 150, 151), those who for a general or special cause cannot, or those who will not, perform these duties, are excluded,[1] except that conversion to the Christian faith, is not, according to Reg. 7 1832. Sect. 9, allowed to operate so as to deprive the heir of his inheritance. (See Sect. 131, Note 3.) These impediments are either *absolute*, or such as cannot be removed by expiatory penance; or *partial and temporary*, or such as can be thus removed.

Impediments to inheritance are:

1 Day a Crama Sangraha, ch. iii. Daya Bhaga, ch. v. Vribaspaty, ibid, ch. v. sect. 4, "a son who is devoid of science, courage and good purposes, who is destitute of devotion and knowledge, and who is wanting in conduct, is similar to urine and excrements." Menu, book ix. sect. 214. "All those brothers who are addicted to vice, lose their title to the imheritance."

189. Absolute impediments are : 1, all offences by which a person —man or woman—becomes an outcast, such as living a profligate life,[1] cohabiting with a Mussulman,[2] ill-treating his father,[3] &c.

2. The being impotent, or born blind and deaf, or having lost a sense or a limb, or being a madman, an idiot or dumb, because these defects are considered as a punishment for crimes committed in a former state.[4]

3. Having renounced the world by becoming an ascetic.[5]

Partial and temporary impediments are : leprosy,[6] long and painful sickness and moral offences in a smaller degree, which may be expiated by penance.[7]

1 Daya Bhaga, ch. v. No. 13. M. Rubbee Koor *versus* Jewaut Ram, S. D. A Rep. vol. ii. p. 257. Unchastity. Digest, book v. sect. 334, Daya Crama Sangraha, ch. iii. No. 17. Mitacshara on Inheritance, ch. xi. sect. 10. No. 3.

2 S. D. A. Rep. vol. ii. p. 109.

3 Daya Crama Sangraha, ch. iii. No. 3. Apostacy was also an impedimene, Menu, book ii. sect. 11, but this has been abolished by Reg. 7, 1832, sect. 9.

4 Daya Crama Sangraha, eh. iii. Not. 1. Digest, book v. sect. 329. Daya Bhaga, ch. v. No. 7. Menu, book ix. sect. 201. Mitachara. on Inheritance, ch. ii. sect. 10.

5 Daya Bhaga, ch. v. No. 11. Mitacshara on Inheritance, ch. ii. sect. 10, No. 3.

6 Digest, book v. sect 321. S. D. A. Rep. vol. v. p. 320, note.

7 Digest, book v. sect. 326. Mitacshara on Inheritance, ch. ii. sect. 10, No. 7

Sons of such persons inherit.

190. The sons of such persons, if devoid of these faults succeed to the Estate,[1] with the exception of the sons of an outcast, who also become outcasts in consequence of having been begotten by any outcast.[2]

They are entitled to maintenance.

All those who are excluded from taking the inheritance on account of such impediments, are entitled to maintenance from the heir, except the outcast ;[3] their daughters are entitled to maintenance until married, and their childless wives are entitled to support for life.[4]

Digitized by Google

1 Daya Crama Saugraha, ch. v. No. 13. Daya Bhaga, ch. v. No. 17. Mitacshara on Inheritance, ch. ii. sect. 10, No. 10.

2 Daya Crama Sangraha, ch. v. No. 15.

3 Daya Crama Saugraha, ch. v. No. 14, 16. Menu, book ix. sect. 202. Daya Bhaga, ch. v. No. 11. Mitachara on Inheritance, ch. ii. sect 10, No. 10.

4 Yajnyawalcya, Daya Crama Sangraha, ch. v. No. 17. Daya Bhaga, ch. v. No. 17. Mitacshara on Inheritance, ch. ii. sect. 10, No. 12.

6. *On Partition of the Estate.*

191. As soon as a Hindu dies, his estate passes immediately to his heirs without any acceptance or recognition on their part. If there be more than one heir, the estate becomes the joint property of the different heirs, burdened with the debt of the deceased, and it remains so whether possessed and administered by one of them or by all, until a partition takes place.[1] The acquisitions made by one or more of the coparceners with the assistance of the joint funds, become joint;[2] and the liabilities, incurred by the manager for and on behalf of the joint family, become the debt of them all;[3] and if any of the coparceners should die during such coparcenary, his legal share of the Estate devolves, without any formal transfer or division, on such other member of the family, who, according to the law of inheritance, may be entitled to hold it. Thus if A. and B., two brothers, live jointly. A. dies, leaving two sons C. and D. and the widow of a deceased son E. Afterwards C. dies, leaving a widow F.; and at last E. dies leaving a daughter G.; this daughter demands a partition. Here, first, a moiety belonged to A., which at his death went to his two sons C. and D. to the exclusion of the widow E., who, as her husband died before his father, is only entitled to maintenance. (Sect. 163.) On the death of C. his four *anas* share goes to his widow F., and on the death of E., his four *anas* share goes to his daughter G. B. cannot claim to succeed to the estate of A. as his brother to the exclusion of F.—A's son's widow—and G.— A's son's daughter—because though the partition is now to take place, it is not the Estate of A. which is to be inherited, but the Estates of C. and D. the representatives of A. If A. had survived both his sons, then B. would of course have been the heir. Introduction.

1 Nareda, "Let the eldest son by concent support the rest like a father, or let a younger son, who is capable, do so." Daya Bhaga, ch. iii. Sect. 1, No. 15.

Digitized by Google

2 S. D. A. Rep. vol. v. p. 199. Seopersad Sing *versus* Kulunder Sing; ibid, vol. i. p. 76.

3 Mitacshara on Inheritance, ch. i. sect. 4. No. 29. Daya Crama Sangraha, ch. vii. No. 31.

Who can demand partition.

192. This copartnership may however be dissolved at the request of any of the persons who legally holds a *share* therein as heir to the Estate,[1] male as well as female.[2] A minor partner cannot himself demand a partition, but his guardian can demand it on his behalf.[3] By having received only maintenance for more than 12 years, the right of a female heir to a share, and to demand partition, is not forfeited.[4]

1 Menu, book, ix. sect. 104. Daya Crama Sangraha, ch. vii. Daya Bhaga, ch. i. No. 35, ch. iii. sect. 1, No. 16.

2 Neelcanto Roy *versus* Money Chowdhrynee, S. D. A. Rep. vol. i. p. 58. Ranee Bhowany Deby *versus* Rance Soorjeemoey; ibid vol. i. p. 135.

3 Colebrooke in Strange, vol. ii. p. 360. Princ. Hindu Law, vol. ii. p. 13.

4 Ranee Bhowaney Deby *versus* Ranee Soorjeemoey. S. D. A. Rep. vol. i. p. 135. Dhunmoney *versus* Sunaton Shah; ibid, vol. iii. p. 30.

Partition can be made during the lifetime of the mother; during minority or absence of one of the heirs.

193. It is not proper that a partition should be made by brethren during the lifetime of their mother, yet when it is made, it is legal and valid, but in that case the mother is to have a share equal to a son's share,[1] and when a division is made by grandsons during the lifetime of their grandmother, she is likewise to have a share.[2] If the partners are partly adult and partly minors, the share of the minor, must, on partition, be secured for him and delivered to his guardian.[3] The same is the case when some of the partners are present and some absent; the share of the absent heir must be secured; if no share is allotted to him, he may on his return at any time claim his share from the other heirs.[4] But if there be no tidings of him for 12 years, he is considered to be dead, and not only is no share secured for him, but his property may be taken possession of by his heirs. (Sect. 82).

1 Daya Crama Sangraha. ch. vii. sect. 1. No. 2. Rugh. Dayatatwa, Cashirama on Dayatatwa and Smriti Chandrica, Daya Bhaga, ch. iii. sect. 1. No. 1, says, that a partition during the mother's lifetime is "not lawful," but this is explained by the other authors as a moral precept. Digest, book v. sect. 115. Princ. Hindu Law, vol. i. p. 50. Strange, vol. i. p. 206, The contemporary wife of the father is only entitled to maintenance. Daya Crama Sangraha, ch. vii. No. 3.

2 Daya Crama Sangraha, ch. vii. No. 4.

3 Colebrooke in Strange, vol. ii. p. 362. Catyayana, Daya Bhaga, ch. iii. sect. 1, No. 17.

Digitized by Google

4 Strange, vol. i. p. 206. Catyayana, Daya Bhaga, ch. iii. sect. 1, No. 17. Vrihaspati, Digest, book v. sect. 394. Gockul Chand Chuckerbutty *versus* Rai Ranee, S. D. A. Rep. vol. ii. p. 167.

194. The division of the Estate is to take place in the following manner : **Division of the Estate.**

1. The debts of the deceased, and of all the partners during the partnership are to be paid ; if not paid before partition, all the partners are jointly responsible to the creditors, and among themselves each is responsible in proportion to his own share. (Sect. 250). **Debts to be paid.**

195. 2. If the deceased has left any legacies, they are to be paid ; if not paid, they remain as a debt against the heirs as far as there are assets left, after payment of all debts. (Sect. 64). **Legacies to be paid.**

196. 3. All the *self-acquisitions* of any of the heirs during partnership are to be deducted, as the separate property of such heir. Every acquisition of a joint family by any of the partners must necessarily be *considered* at first as joint, and as being either the produce of the joint stock, or an acquisition by the expenditure or the use of the joint fund ;[1] but if it can be clearly proved, that it was acquired by labour or skill without using the joint fund,[2] or merely with an unimportant assistance,[3] it belongs to the acquirer alone, *for*, says Menu,[4] it was gained by his own exertions. From this rule there is one exception ; in case a son has made self-acquisitions, during the life-time of the father, *the father* is entitled on separation to a half-share of such acquisitions.[5] **Self acquisitions to be separated.**

That such self-acquired property formerly belonged to the family and had been illegally lost, will not generally exempt it from the rules which apply to self acquisition, when re-acquired without the use of the joint fund ;[6] yet, if it be *landed property*, the recoverer gets only a fourth share for having re-acquired it. (Sect. 203.) **and *recovered* moveable property.**

1 Daya Bhaga, ch. vi. sect. 1, No. 1. Durputee *versus* Haradhun Sircar. S. D. A. Rep. vol. iii. p. 74. Koulnath Sing *versus* Jagrup Sing, ibid. vol. v. p. 10. Gourchunder Roy *versus* Hurrishunder Roy, ibid, vol. iv. p. 162. Kripa Sidhoo Patjosee *versus* Kanhaya Acharjee, ibid. vol. v. p. 335

2 Menu, Vyasa, Catyayana, Digest, book v. sect. 345 to 348. Daya Crama Sangraha, ch. iv. sect. 2, No. 11. Daya Bhaga, ch. vi. sect. 1. No. 3. Khoodu-ram Sormo *versus* Trilochun. S. D. A. Rep. vol. i. p. 35. Soobun Lal *versus*

Digitized by Google

Hurbun Lal, ibid, vol. i. p. 91. Kaleepersad Roy *versus* Degumber Roy, ibid vol. ii. p. 237, sec also vol. i. p. 76, note.

3 For instance, if an agriculturer takes a rope from the joint stock for his plough, but employs his own cattle and implements, Digest, book v. sect. 356. Strange, vol. ii. p. 372, but if a partner lives upon the joint stock, or his maintained by his copartners during the time he acquired the science or skill, the profits are joint. Mitacshara on Inheritance, ch, i. sect. 4. No. 8. Catyayan Digest, book v. sects. 355, 357. The expenditure must have been actually intended for that purpose, Daya Bhaga, ch. vi. sect. 1. Nos. 47, 48; and education in general from the joint fund does not make all future acquisitions to be joint.

4 Menu, book ix. sect. 208. See also Mitacshara on Inheritance, ch. i. sect. 4, No. 12. If a house is built by one of the co-sharers upon ground which was common property, it will still be his separate property. Daya Bhaga, ch. vi. sect. 2, No. 30. S. D. A. Rep. vol. i. p. 36, Note.

5 Catyana, Digest, book v. sect. 103,

6 Menu, book ix. sect. 209. Yajnyawalcya, Digest, book v. sect. 352. Daya Crama Sangraha, ch. iv. sect. 2, No. 6. Daya Bhaga, ch. vi. sect. 1. No. 40. Mitacshara on Inheritance, ch. i. sect. 4. No. 1.

And gifts to a single sharer.

197. Gifts from a friend,[1] or from the father,[2] or mother;[3] presents at nuptials, or received as a mark of respect to a guest, are classed with self-acquisitions. If a present is received in return for other presents from the joint fund, such presents are of course joint.[4]

1 Menu, book ix. sect. 206. Digest, book v. sect. 345. Daya Crama Sangraha, ch. iv. sect. 2. Mitacshara, on Inheritance ch. i. sect. 4. No. 1. "sacrificial presents." Daya Bhaga, ch. vi. sect. 2, No. 4. Mitacshra on Inheritance, ch. i. sect. 4, No. 27. Purtab Bahadoor Sing *versus* Tilukdarce Sing, S. D. A. Rep. vol. i. p. 178.

2 Nareda, Digest, book v. sect. 353. Mitacshara on Inheritance, ch. i. sect 4, No. 28.

3 With the consent of the husband, Digest, book v. sect. 360. Vyasa, Digest, book v. sect. 354. Nareda, ibid, book v. sect. 353.

4 Mitacshara on Inheritance, ch. i. sect. 4, No. 6.

as well as things not fit for division.

198. 4. Things used exclusively by any of the partners are excluded from partition, as wearing apparel, ornaments, house furniture, culinary implements, carriages, &c.,[1] but not if they are for the use of the family in general, as marriage-dresses and ornaments, carriages for the family, &c.;[2] things not fit for partition are also excluded, such as private roads, a tank or a well, a place of sacrifice, &c.,[3] which should be used alternately.

1 Menu, book ix. sect. 219, and Vishnu, Daya Crama Sangraha, ch. iv. sect. 2, No. 13. (Habitual wear is considered a mode of acquisition), sancha and Lichita, Daya Crama Sangraha, ch. iv. sect. 2, Nos. 28, 29. Mitacshara on Inheritance, ch. i. sect. 4, Nos. 19, 17. Digest book v. sect. 365, 366.

Digitized by Google

2 Mitacshara on Inheritance, ch. i. sect. 4, Nos. 18, 19. Catyayana, Digest, book v. sect. 365.

3 Daya Crama Sangraha, ch. iv. sect. 2, Nos. 18, 21. Mitacshara on Inheritance, ch. i. sect. 4, Nos. 21, 26. Catyayana, Digest, book v. sect. 365.

199. *On a division among sons.* 1 each of the father's wives, who is a mother, must be assigned a share equal to that of a son,[1] but if any separate property has been given to the mother, she gets only a half share.[2] A childless wife gets only maintenance according to the Bengal school;[3] but according to the Benares and Mithila school she is also entitled to a share.[4]

On a division among sons;

a, mother, a share;

2. To the unmarried daughters such portion must be allotted, as may suffice for the due celebrations of their nuptials.[5]

b, daughters, a marriage portion;

3. And an uninitiated brother must be initiated at the charge of the whole estate.[6]

c, uninitiated brethren to be initiated.

1 Daya Bhaga. ch. iii. sect. 2, No. 29. Mitacshara on Inheritance, ch. i. sect. 7, No. 1. Daya Crama Saugraha, ch. vii. No. 2. Vrihaspati, Digest, book v. sect. 85.

2 Daya Bhaga, ch. iii. sect. 2, No. 31. Mitacshara on Inheritance, ch. i. sect. 7. No. 2, for instance, at the second marriage of her husband.

3 Daya Bhaga, ch. iii. sect. 2. No. 30. Daya Crama Sangraha, ch, vii. No. 3.

4 Vyasa, Daya Bhaga, ch. iii. sect. 2, No. 32. Vrihaspati, Daya Crama Sangraha, ch. vii. No. 7.

5 Daya Bhaga, ch. iii. sect. 2. Nos. 34, 36, 39. Vrihaspati, Digest, book v, sect. 85. Vishnu, Digest, book v. sect. 86. Menu, book ix. sect. 118. Digest, book v. sect. 120, fix the portion of a daughter generally at the fourth of a share of a son see also Daya Crama Sangraha, ch. vii. No. 9. Mitacshara on Inheritance, ch. i. sect. 7, No. 5. Princ. Hindu Law, vol. i. p. 50. Sutherland, in Strange, vol. ii. p. 367. Thus if there be one son and one daughter, the estate should be divided into two parts, and one of those two parts should be divided into four; the daughter takes one of these fourths, or one-eighth. If there be two sons and one daughter, the estate should be divided into three parts, and one of them into four, the daughter takes then one twelfth. If there be one son and two daughters, the Estate should be made into three parts, and two of those three parts divided into four, and the daughters take each one of these fourths. The opinion in Mitacshara on Inheritance, ch. i. sect. 7, Nos. 6, 7. that a daughter should be entitled to a distinct portion, seems not consonant with the spirit of the Hindu Law, Vijayaneswara therefore construes the above authorities as merely intending that a sufficiency for the daughter's marriage should be given. This is the opinion of the Mithila school. Daya Crama Sangraha, ch. vii. No. 10.

6 Daya Bhaga, ch. iii. sect. 2, Nos. 38, 42. Mitacshara on Inheritance, ch. i. sect. 7, No. 4, Vyasa, Daya Crama Sangraha, ch. vii. No. 32.

200. *On a division among brothers* during their father's lifetime, when one son has made acquisitions especially by personal

Division among brothers during father's lifetime.

Digitized by Google

labour through the use of the patrimony, the father is to take half; the acquirer two shares, and the rest one share each.

Catayayana, Digest, book v. sect. 103.

When the father has made a distribution during his lifetime.

201. If the father has distributed his property among his son during his lifetime, by making an equal or unequal partition among them, (Sect. 264 seq.) the residue of his property goes after his death to the son, who is born after partition,[1] or in default of such son, to the other sons in equal shares. Should the afterborn-son, by taking the residue, not get a share equal to what his brothers had obtained, the other brothers must contribute to a share out of their portions.[2]

1 Vrihaspati, Digest, book v. sects. 100, 392. Daya Crama Sangraha, ch. v. Nos. 16 to 20.

2 Vishnu, Daya Crama Sangraha, ch. v. No. 24.

The remainder to be shared equally.

202. After the above mentioned deductions (Sect. 194 to 198) have been made, the remainder is to be divided among the cosharers according to their respective shares; as well what has been inherited, as what has been acquired in consert.[1] Any *improvement* of joint property effected by the exertions of one of the partners does not confer on him a title to a greater share,[2] nor does any want of exertion to contribute to the joint fund deprive such partner of a right to an equal share with his more industrious partners,[3] but if acquisitions have been made by one of the partners *especially* by personal exertions with some small assistance from the joint fund, such partner is, on partition, entitled to a double share of the acquisitions according to the Bengal school;[4] according to the Benares and Mithila school, they all share equally.[5]

except:

1, that the acquirer by personal exertions with small assistance of the joint fund, takes a double share;

1 Nareda, Digest, book v. sect. 111. Daya Bhaga, ch. vi. sect. 1, No. 2, 38.

2 Yajnyawalcya Digest, book v. sect. 74. Mitacshara on Inheritance, ch. i. sect. 8, No. 4.

3 Strange, vol. i. p. 197, 220.

4 Daya Bhaga, ch. v. sect. 1 No. 28. ch. vi. sect. 2, No. 39, Mitacshara on Inheritance, ch. i. sect. 4, No. 29. Vyasa, Daya Crama Sangraha, ch. iv. No. 3. Digest, book v. sect. 110. Vasishta, Digest, book v. sect. 75. 138, 356. Gudadhur Surmo *versus* Ajodheram Chowdry, S. D. A. Rep. vol. i. p. 6. Princ Hindu Law, vol. i. p. 52.

5 Mitacshara on Inheritance, ch. i. sect. 4. No. 31. Princ. Hindu Law, vol. i. p. 52, vol. ii. p. 4.

2, that the *recoverer* of ancestorial landed

203. Should one of the coheirs *recover landed* property formerly belonging to the family, the property belongs to all the co

sharers, but the recoverer is to be remunerated for his trouble by receiving one-fourth of the property besides his own legal share.[1]

property, takes a fourth besides his legal share;

This refers of course only to property to which the legal title was vested in all the copartners or their ancestors, and not to property which has once been legally alienated by the copartners or their ancestors, and has been afterwards acquired by one cosharer through his sole exertions and means. It refers, for instance, to property which has been stolen or illegally taken possession of by some other party; the legal title being in the legal owner—the family or their ancestors—and the property being recoverable by legal proceedings or otherwise, it is proper that the property, when recovered, should belong to the family; but the rule does not refer to property which has been sold by the proprietor, or lost for arrears of revenue, or by non-payment of a mortgage and conditional sale, when such property has been re-acquired by one of the partners unassised by the joint fund; in these last cases the family being legally divested of their title, it is a mere accident that the property formerly belonged to the family.[2]

1 Daya Crama Sangraha, ch. iv. sect. 2, No. 8. Daya Bhaga, ch. vi. sect. 2, Nos. 38, 39. Mitacshara on Inheritance, ch. I. sect. 4, No. 3. Sancha, Digest, book v. sect. 359. Yajnyawalcya, Digest, book v. sect. 352. About recovered *moveable* property, see ante. sect. 196.

2 Digest, book v. sect. 393.

204. Should any of the partners have spent part of the estate exclusively *for himself*, for instance, in making presents to his wife, children, &c., it will become part of his allotment, because one partner cannot alienate the patrimony on his own account;[1] but if one of the partners has been obliged to incur larger expenses than the others on account of having a larger family, nuptials in his family, &c., he will not be required to make it good from his own share, because all the coheirs are interested in the fulfilment of these duties and these charges fall therefore on the common estate.[2] Nor will he be required to refund any sums he may have expended on himself for the benefit or all,[3] as for instance, if he had engaged a conveyance to perform some duty or business for the benefit of the joint estate.

3, that expenditure for the *sole* benefit of one partner is deducted from his share.

1 Digest, book v. sect. 373.

2 Digest, book v. sect. 136. Daya Crama Sangraha, ch. vii. No. 29.

3 Digest, book v. sect. 373.

Digitized by Google

Privileges and rights are to be shared as other property.

205. Privileges and rights belonging to the family are generally heritable and divisible amongst the heirs, like other property.[1]

Not endowed lands;

Endowed lands and property given to Pagodas, Thakoors or for other religious and public purposes are not inheritable, as the property belongs to the Debta or to the institution ; such property cannot therefore be divided, and if a division has been made, it is void,[2] but the surplus of the income, after all proper and necessary expenses have been defrayed, may be divided by the heirs according to their respective shares.[3] Yet, if the endowment is only a *nominal one*, viz., if the income is applied to personal use and the endower, (the endowment having been made without the sanction of Government,) continues to exercise an individual proprietary right over it, the property is alienable and divisible as property.[4]

but the surplus of income.

Exception.

1 Colebrooke, in Strange, vol. ii. p. 369.

2 Catyayana, Digest, book v. p. 365, Menu, book xi. Sect. 26. Elder widow *versus* Younger widow of Raja Chuther Sen, S. D. A. Rep. vol. i. p. 180. Joymoney Deby *versus* Fakeer Chunder Chuckerbutty, ibid, vol. iv. p. 337. Bhowany persad Chowdry *versus* Ranee Jugudumba, ibid, vol. iv. p. 343. Ramsunder Roy *versus* Raja Udwant Sing, ibid, vol, v. p. 210.

3 Rajoo *versus* Buddun, S. D. A. Rep. vol. ii. p. 13.

4 Mahatab Chand *versus* Mirdad Ali, S. D. A. Rep. vol. v. p. 268. See also Kissenmohun Banurjee *versus* Ramindar Deb Raj, ibid, vol. iv. p. 197.

The right to perform ceremonies may be hereditary.

206. The right of performing the religious ceremonies of certain classes of people as Poorohit, is by *custom* considered analogous to real property.[1] The ancestral Priest, that is, he who has been honoured by former generations with the employment of officiating Priest, and the Priest *appointed* by the party himself, cannot be discarded without good and sufficient cause ;[2] but there is no legal authority for establishing the right of the heirs to officiate. The *male* heir of an *hereditary* Poorohit is however *by custom* considered entitled thereto, but not the heirs of an appointed Priest.[3] A female cannot succeed to such right and perform the ceremonies by a substitute, because she can appoint a substitute only for *worldly* affairs, not for solemn acts for the performance of which she herself is disqualified.[4] Several *male* heirs share the fees according to their respective portions, and if they have divided the Jujmans among them, each one will take the fees from his respective Jujmans.

but is not inheritable by females.

Digitized by Google

This right is a personal right unconnected with the residence of the Jugmans; a new inhabitant is not bound to use the Poorohit generally employed by his caste in the village.[5] the right is personal.

1 Nareda, Digest, book ii. sect. 3, No. 63. Sutherland, in Strange, vol. ii. p. 12.

2 Sancha and Lichita, Digest, book ii. ch. 3, sect. 41. Radha Kissen *versus* Sham Surmo. S. D. A. Rep. vol. ii. p. 259.

3 Digest, book ii. ch. 3, sect. 63.

4 Digest, book ii. ch. 3, sect. 63.

5 S. D. A. Rep. vol. ii p. 261.

207. Some offices,[1] for instance, Agrabarica (the office of priests attending at funerals) are heritable,[2] and the perquisites divisible among the heirs, but, the fees being a remuneration for work, each heir must perform his proportional share of work to be entitled to a share of the perquisites.[3] Even females may take a share by appointing a substitute, the office being a mere worldly affair.[4] Some offices are heritable. even by females.

Other offices whose duties could not be performed by several individuals, as the office of a Cauzy, Canongo, Mundul, Putwarry, and even of a Payk, were inheritable, but *not divisible*; the perquisites went exclusively to him who performed the work;[5] but the offices of a Cauzy and Canongo are no longer heritable.[6] and the other offices are also filed up by nomination, regard being had to former local custom.[7] Lands belonging to such offices (Nankar, Chakaran) are of course neither heritable nor divisible; they are perquisites of office, and belong to the successor in the office during his appointment.[8] but now generally filled up by nomination.

1 To conduct Pilgrims to Gya is no office. Every one can choose his own Kurhwa (conductor). Beharee Gyawal *versus* Deepoo, S. D. A. Rep. vol. ii. p. 164.

2 Kalachand Chuckerbutty *versus* Joogul Chuckerbutty, S. D. A. Rep. vol. i. p. 279.

3 Digest, book v. sect. 365.

4 Digest, book ii. ch. 3, sect. 63.

5 Digest, book v. sect. 365.

6 Reg. 39, 1793, Sect. 6. Ced. and Conq. Prov. Reg. 46, 1803, Sect. 5 Reg. 4, 1808, sect. 4; Reg. 2, 1816, sect. 6.

7 Reg. 12, 1817, sect. 7.

8 Reg. 13, 1825.

208. On a division among the heirs, the females who are entitled to maintenance, are not entitled to demand that their maintenance shall be secured for them by setting apart any pro- Females entitled to maintenance are not entitled to get property set a

Digitized by Google

part for securing the maintenance.

perty for that purpose, though such is often done by mutual consent. The duty of maintaining the females is *a personal duty*, and rests not upon the whole dividing family, but upon the *nearest* relative. Thus on a division among a son, a son's son and a son's widow, the step-mother is to have her maintenance from her step-son alone, not from the other more distant relatives.[1]

It is a personal duty of the *nearest* relative.

Maintenance how to be settled.

If a reasonable maintenance is not allowed, the Court is to award a monthly sum for that purpose with reference to the usage of the family and their circumstances in life,[2] and in proportion to the property—self-acquired as well as inherited—of the person or persons who are bound to give the maintenance.

1 Kistanundo Chowdhry *versus* Rookeny Deby. S. D. A. Rep. vol. iii. p. 70.

2 Beloo *versus* Phoolchand. S. D. A. Rep. vol. iii. p. 223.

Property found after partition to be shared.

209. If, after a division among the heirs, any property is found to belong to the Estate, which had been left out at the division, for instance, through having been secreted by one of the heirs, such property is to be shared proportionally by the heirs,[1] but the division, which has once taken place, is not thereby invalidated,[2] nor is the concealer to be deprived of his share on account of his concealment.[3]

1 Catyayana, Digest, book v. sect. 374. Menu, book ix. sect. 218. Daya Bhaga ch. xiii. Daya Crama Sangraha. ch. viii.

2 Daya Bhaga, ch. xiii. No. 6. Daya Crama Sangraha, ch. viii. No. 3. Menu, book ix. sect. 47, "once is the partition of inheritance made; once is a damsel given in marriage, and once does a man say I give," these three are, "by good men, done once for all and irrevocably."

3 Daya Crama Sangraha, ch. viii. No. 2.

Partition how to be made and how ascertained.

210. A partition may be made without having recourse to writing[1] or other formality, and in the event of its being disputed at any subsequent period, the fact may be ascertained by circumstantial evidence.[2] It cannot always be inferred from the manner in which the brethren live, as they may reside apparently in a state of union and even mess together,[3] and yet in matters of property be separate, while on the other hand they may reside apart and yet be in a state of union with respect to property,[4] though it is undoubtedly one of the presumptive proofs in a case of uncertainty. Proofs must be sought in their performing separate

Digitized by Google

rities,[5] entering into distinct contracts, becoming sureties one for the other, or performing other similar acts, which tend to show, that they have no dependence on, or connection with each other.[6] That they have messed separately and had no share in the profit or loss of a trade, has been considered as proof of separation, though the one party had been occasionally employed by the other and had received supplies for his private expenses.[7] The evidence of kinsmen is in these cases not ouly admitted, but even preferred.[8]

1 If the partition is made in writing, it must be written upon stamp paper. Each sharer's copy according to the value of his share; when under 100 Rupees, on 8 aunas stamp paper; between 100 and 200—1 Rupee; 200 and 400—2 Rupees; 400 and 600—4 Rupees; 600 and 800—6 Rupees; above 800—8 Rupees; besides for any sum agreed to be paid for equality of partition, with an additional stamp as for a sale for an equal sum. Reg. 10, 1829, A. No. 41.

2 Nareda, "If a question arise among coheirs in regard to the fact of partition, it must be ascertained by the evidence of kinsmen, by the record of the distribution, or by the separate transaction of affairs." Daya Bhaga, ch. xiv. No 1. Princ. Hindu Law, vol. i. p. 63; vol. ii. p. 170.

3 Khodaram Surmo *versus* Trilocun. S. D. A. Rep. vol. i. p. 35.

4 Daya Bhaga, ch. vi. sect. 1, No. 27.

5 Daya Bhaga, ch. xiv. No. 7. Mitacshara on Inheritance, ch. xi. Digest, book v. sect. 389.

6 Daya Bhaga, ch. xiv. Nos. 7, 9. Digest, book v. sect. 380 to 387.

7 Rugkissore Roy *versus* the Widow of Santo Dass. S. D. A. Rep vol. i. p. 13.

8 Daya Bhaga, ch. xiv. Nos. 2, 4. Nareda, Digest, book v. sect. 381.

CHAPTER VI.

On the Order of Succession according to English Law.

1. Introduction.

211. Succession according to English Law originates from two different sources, and is regulated upon two different principles. Succession to *real estates* originates partly from the old customs of the land, and partly from the feodal law, and is regulated on the principle, that the estate shall remain in the family to which it originally belongs, and be preserved undivided to keep up the dignity and influence of the family. The eldest son suc-

Foundation of the English Law of inheritance.

to real estates.

Digitized by Google

ceeds therefore to the exclusion of all the younger sons; daughters succeed only in default of sons, and an estate descended from the father's side, can never be inherited by relatives on the mother's side, and vice versa. Suceession to the *personal estate* is on the contrary established by the written law, and regulated on the principle that the property shall go to those whom the deceased was bound to maintain, or in failure of them equally to the next of kin.[1] The wife is therefore entitled to a share, and all children take equally without any distinction of sex.[2]

to personal estates.

The husband succeeds to the property of his wife for another and special reason, viz., on account of marriage.[3]

to the property of the wife.

1 2 Blackstone's Com. p. 210.

2 2 Blackstone's Com, p. 515.

3 2 Blackstone's Com. p. 434. Toller, p. 212.

Real estate what.

212. A real estate consists according to English Law of such things as are permanent, fixed and immoveable, as lands and houses with their fixtures—doors, windows, trees on the ground, fruit on the trees, &c.[1]—and all rights thereto belonging—as commons, ways and rents. Money covenanted to be laid out in land is also considered a real estate.

Personal estate what.

Personal property is not only all that is moveable—as money, bonds, rents in arrears, jewels, domestic animals, furniture and the like—but also immoveable property, to which the deceased had only a *temporary* right, for however long a term, as for instance, leases. Growing crops are reckoned among personal property as a compensation for planting tilling, &c.[2]

1 For farther particulars see Chitty's "Law of Contracts;" Tomlin's Law Dictionary, p. 243.

2 2 Blackstone's Com. p. 386. Toller, p. 176, 191. Lovelass, p. 29. The English distinction between real and personal estste, is applicable in this country among British subjects, see 9 George iv. ch. 33, sect. 6.

2. *On the Succession of Husband and Wife.*

The husband succeeds to the whole personal estate of his wife.

213. By marriage the husband and wife are considered to have become one person; her very legal existence is deemed suspended during marriage, or at least incorporated or consolidated into that of the husband, under whose protection she performs

Digitized by Google

every thing. She is not therefore considered to have any *personal* property; every thing of that nature to which she is entitled at the time of her marriage, or which accrues to her by gift, bequest or otherwise during her marriage, is vested *solely* in the husband, who may dispose of it during life time, or bequeath it at his death; and if he does not dispose of it, it goes to his heirs generally, and not to his wife exclusively. The husband need not therefore take out any letters of administration to administer to her personal estate, unless he is to recover any right belonging to her, when he is *entitled* to administration by statute 29 Car. ii. chap. 3.

2 Blackstone's Com. p. 435. Toller, p. 212. Lovelass, p. 3, 67.

Except to choses in action, which he can only recover as administrator.

214. The above rule however holds good only with respect to that personal property which has actually come into the husband's estate, and not to personal property which had not yet been received at the time of the death of the wife,—except arrears of rent due to her, according to 32 Henry viii. chap. 37—and which in case of refusal can only be recovered by legal proces, such as, money due on simple contracts, specialty, damages for breach of contracts, &c. Such property (called choses in action) will go to her representative, because these things never came into his possession, and as she is dead, the husband is no longer one and the same person with her. He can only recover such things as her administrator (Sect. 213), and may then retain them for his own use.

2 Blackstone's Com. p. 435. Toiler, p. 224, 474.

The husband does not succeed to the *real* estate of his wife, but may enjoy it for life, if he has had a child by her, born alive and capable of inheriting the property.

215. The *real estate* possessed by the wife at the time of, or during the marriage, is considered as her peculiar property. During marriage the husband may dispose of the rents, but the wife only can depose of the property itself by sale or otherwise *with* the consent of her husband, and on her death it goes to *her* heirs, not to the husband, unless he has had a child by her, born alive and capable of inheriting the property, when he is to enjoy the estate for life, whether the child be dead or alive, and it is only on his death, that the property will go to *her* heirs. Real property to which the wife had only a claim, but which had not actually

Digitized by Google

come into her possession before her death, will immediately go to her heirs; the husband is not entitled to enjoy it.

2 Blackstone's Com. p. 434. Lovelass, p. 94.

The wife takes one-third or one half of her husband's *personal* property.

216. The wife succeeds on the death of her husband to one third, if there be children, and to one-half, if there be no children (sect. 225,) of his *personal* property, in which whatever she may have brought into the estate on or after marriage, obtained by gifts or bequests, not expressly given for her own exclusive use or acquired by her own exertions, is merged.[1]

and her paraphernalia.

Over and abvoe the said one-third or one-half, the widow is entitled to her apparel and ornaments (paraphernalia) *suitable* to her rank and degree. The husband cannot dispose of these things by his will, and even if he has mortgaged them, they must be released from his estate and restored to her; but if all the creditors cannot be satisfied, the widow is only entitled to take her *necessary* apparel.[2]

From his *real* estate, the wife takes her dower.

Of the real estate belonging to the husband the widow takes only *her dower*, viz., one third, or other customary share. She is only to enjoy that share during her life; on her death it devolves on the heirs of her husband.[3] Right of dower attached formerly to all land not conveyed to the husband in a special manner for the purpose of barring this right, even to land disposed of by the husband during marriage without the assent of the wife, but according to Act 29 of 1839, by which the 3d and 4th William iv. ch. 105 was re-enacted, women married after the 1st of January 1840, cannot claim dower out of land disposed of or incumbered by their husband in their lifetime or by their will. Right to dower is of no force against creditors.

or in lieu thereof her jointure.

Dower is generally parted with by the wife before marriage in consideration, of a jointure or other provision. A jointure is a provision for the wife made by the husband out of his real estate in case she should servive him. Both of them have a *joint* interest (hence the term) in such property during their lives, and the survivor is entitled to the whole.[4] If she should loose her jointure by any accident, she is entitled to her dower.

1 2 Blackstone's Com. p. 433. Lovelass p. 157.

Digitized by Google

2 2 Blackstone's Com. p. 435. Toller, 229. Lovelass, p. 36.
3 2 Blackstone's Com. p. 131, Lovelass, p. 96.
4 2 Blackstone's Com. p. 182. Lovelass, p. 99.

217. Besides the above the widow is of course entitled to take from the estate whatever belong to her in her own exclusive right, viz.

The widow is entitled to her peculiar property, viz.

1. The real estate which she was possessed of in her own right before or after her marriage, and of which no disposal has been made during the lifetime of her husband, who cannot dispose thereof by will.[1]

1. Real property possessed in her own right.

2. Personal property accruing to the estate in her right, and which had not yet been brought into the husband's estate (Sect. 214), and therefore belonged to her in right of survivorship.[2]

2. Personal property possessed in her own right *not* taken possession of by the husband.

3. Whatever had been given for her separate use by her husband or others. To separate such property from the husband's estate, it should be given in trust, that is to say, some persons should be appointed by deed to apply the same for her benefit; yet, if no trustees have been appointed, the husband will be considered as trustee in case it can be inferred from circumstances, that the property was destined for her own separate use; but all gifts from the husband are invalid against creditors.[3]

3. Other property settled upon her.

1 2 Blackstone's Com. p. 434. Toller, p. 213.
2 2 Blackstone's Com. p. 434. Toller, p. 220.
3 Toller, p. 218, 222, 226.

3. *On Succession to real Estates.*

218. The first class of heirs to a real estate are the descendants; first the eldest son, or his descendants, if he should die leaving issue; and next the second and other sons, according to priority of birth and their descendants. In default of sons and their descendants, the Estate descends to daughters in equal shares, if more than one; and to the descendants of any deceased daughter collectively, or by representation[1] (see Sect. 158). Thus if a man A. has two sons B. and C., and B. dies, leaving two sons E. and F., and then the grandfather dies; in this case E. the eldest son of B. will take the Estate to the exclusion of C. the younger son

Order of heirs to real estates.

1 Descendants.

Case.

Digitized by Google

of A.; and if B. had left two daughters, they would have succeeded to equal portions of the estate to the exclusion of C. and his issue.

Case.

Again if a man A. has 3 daughters, B. C. and D., and B. dies leaving two sons, C. leaving two daughters, and D. leaving a daughter and a son, who is younger than his sister; here, when the grandfather A. dies, the eldest son of B. will succeed to one-third, to the exclusion of the younger; the two daughters of C. to another third in partnership, and the son of D. to the remaining third to the exclusion of his elder sister.

[1] 2 Blackstone's Com. p. 210. Lovelass, p. 86.

Illegitimate children do not inherit.

219. Illegitimate children (bastards) can neither inherit from the father nor mother, nor from any of their relatives.

[1] Blackstone's Com. p. 459. Lovelass, p. 84.

2. The next of kin.

220. If there be no descendants it is necessary to inquire whether the estate is ancestral or self-acquired;[1] in the first case the estate will go only to the family from which it descended, that is on the father's side *or* on the mother's side as it might happen; in the latter case it will go to the kindred on both sides, but first to the relations on the paternal side, who, however distant, will exclude those on the maternal side, however near.[2] The paternal grandfather and his descendants or the paternal great-grandfather and his descendants will therefore succeed even before the mother.

[1] Every estate is now to be considered as self-acquired, until the contrary be proved, Act 30, 1839. sect. 2.

[2] 2 Blackstone's Com. p. 234.

First brothers and sisters and their issue.

221. In default of descendants the next heir to a real *ancestral* estate will thus be on the brothers and sisters of the deceased, either on the father's or on the mother's side, the eldest brother before the younger, brothers before sisters; sisters collectively, and those of the whole blood before those of the half. (Sect. 218.) Thus a *paternal* estate will first go to the eldest brother of the whole blood and his issue, then to the other whole brothers and their issue in order of birth; then to the sisters of the whole blood all together and their issue, then to the brothers of the half blood on the father's side and their issue, and next to all the sisters of the half blood on the father's side; but a *maternal* estate will, in default of brothers

Digitized by Google

and sisters or the whole blood go to brothers and sisters of the half blood on the *mother's* side.[1] The brothers and sisters of the half blood on the father's side can never inherit a *maternal* estate and vice versâ.

[1] The Brothers and sisters of the half blool were formerly excluded. 2 Blackstone's Com. p. 227.

222. A *self acquired* estate will first go to the father,[1] then to the brothers and sisters as above; the mother and half brothers and sisters on the *mother's side* will first succeed to the estate in default of any relative of the paternal side, however remote.

Order of succession of next of kin to self-acquired real estate.

Father, brothers and sisters.

[1] The father and grandfather were formerly exeluded. 2 Blackstone's Com. p. 226; but have been admitted by Act. 30, 1839, scet. 6.

223. In default of brothers and sisters and their issue, a self-acquired estate will first go to the issue of the father's parents, respect being still had to their age and sex; then to the issue of the parents of the paternal grandfather, and so on. Kindred derived from the blood of the male ancestors, however remote, are admitted before those of the blood of the female ancestors, however near.

Then to paternal grandfather and his descendants and so on, male however remote preferred to female however near.

In default of any kindred in the paternal line, the estate will go to the maternal line in the same regular successive order as in the paternal line.

Then to the maternal line.

4. *On Succession to personal Estates.*

224. In the time of Henry the 2nd, a man's goods were to be divided into three equal parts, of which one went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal; if he died without a wife, or without children, he might dispose of one moiety; and if he died without either, he might dispose of the whole. By special custom this was by degrees altered so that a man could always bequeath the whole of his personal property, and this was at length made law by Statute 4 and 5, William and Mary ch. 2, 7 and 8, William iii. ch. 38. 4 George i. ch. 18.[1]

Right of bequeathing a personal estate was in former times restricted

but has since been made unrestrictedd.

In case a man did not dispose of that part of his goods, which was devisable, it went by the old law to the King, as the general trustee of the kingdom. The crown transferred this right as a privilege to some Lords of manors, and others, and afterwards

The king, lords and Church formerly sometimes entitled to a portion.

Digitized by Google

Church entitled to administer the estate,

generally to the Church, to procure benefit to the soul of the deceased, but this right being abused by the Church and the debts of the deceased being left unpaid, the Church was first ordered to pay the debts, and afterwards to give over the estate for administration to the nearest and most lawful friends of the deceased; which was again altered and the administration ordered to be given either to the widow, or to the next of kin, or to both of them.

but now obliged to grant administration to widow or next of kin.

[1] 2 Blackstone's Com. p. 491.

[2] 2 Blackstone's Com. p. 494.

The share of the husband.

225. It has been observed, that if a wife dies without a will, her husband will take her whole personal estate, with the exception of such property as has not yet come into his possession, to which he can only succeed as administrator, (Sects. 213, 214,) and that the wife, under the same circumstances, is entitled to one third when her husband dies leaving children, and to one-half when he dies without children (Sect. 216). If there be no wife, the whole, or if there be a wife, the remainder of the estate will be distributed in the follwing order. (22 & 23, Car. ii. ch. 10.)

and wife.

[2] Blackstone's Com. p. 517. Toller. p. 370. Lovelass, p. 67.

Order of succession to the personal estate. 1. The children.

226. 1. The fitst class comprizes the children. All the children take an equal share without distinction of sex, and whether they be children of one or of different mothers. The heir at law—that is the heir who takes the real estate—takes an equal share of the personal estate with the others. Illegitimate children do not inherit (Sect. 219). If one of the children has died leaving children, these take by representation. (Sect. 218.)

take equally; advancement to be brought in,

227. If any of the children have received an advancement from their parents, for instance, on marriage, or by some other provision from which actual benefit has accrued to the child, the advance must be returned, or rather brought to account on distribution, so that each child may actually receive an equal portion. Small inconsiderate sums occasionally given to a child are not considered as an advance, nor is his maintenance, or any allowance made by a father to his son at the University, or in travelling, or the like, considered in this light, these being only given for his education.[1]

otherwise the child will loose his portion.

If one of the children should have obtain more as an advance than his actual share will amount to, he is not forced to return such surplus, but is merely excluded from the distribution. The

Digitized by Google

widow, if such there be, on the distribution, will have no advantage from bringing in the advance, it being only made for the sake of the children.[2]

Thus if a man dies leaving a wife and a son A., a daughter B., and two children of a deceased daughter C. and a real as well as a personal estate. Suppose the personal estate to be worth 30,000 Rupees after payment of debts, &c., and that the father having given his son a very expensive education, had on the marriage of his two daughters B. and C. given to the first 20,000 Rupees, and to the seccond 10,000 Rupees. Then : 1st. The mother will take her third share of the personal property, viz., 10,000 Rupees. Case.

2nd. The eldest son will take the real estate and also one-third of the remaining 20,000 Rupees; the sums spent upon his education he is not bound to bring in, but the two daughters must bring in the 30,000 Rupees they have received. The personal estate would thus be 50,000 Rupees, of which A., B. and the children of C. would each take one-third, but as B. has received more than her proper share (viz. one-third of 50,000 Rupees) and is not obliged to return the surplus, she will be excluded from the distribution, and the 30,000 Rupees will be distributed between A. and C's children. A. will take 15,000 of the above 20,000 Rupees, and C's children will obtain the remaining 5,000, which together with the 10,000 their mother has received in her lifetime, makes up the 15,000, to which they are entitled in right of their mother.

1 Blackstone's Com. p. 517. Toller, p. 397, Lovelass, p. 71.

2 Toller, p. 394. Lovelass, p. 70.

228. 2. In default of children, the grand children succeed in equal shares, and not by representation. Thus if one child has left 3 children, one 2, and one only 1, the property will be divided into six equal shares. If any of the children have received an advance it must be brought in, and deducted from the share of the children of such child, in the manner above stated.[1] 2. The grand children.

If any of the grand children are dead and have left children, these take by representation. (Sect. 218.)

1 Lovelass, p. 70 to 72.

229. 3. In default of descendants, the father takes alone. 3. The father.

Digitized by Google

4. The mother together with brothers and sisters.

230. 4. In default of the father, the mother takes together with the brothers and sisters. The mother takes half, and the brothers and sisters half among them, without distinction of sex or whether they be of the half or whole blood; if one of them is dead, his issue will take by representation.

If the mother is dead, brothers and sisters and their issue will take the whole; and if there be no brothers or sisters, the mother will take the whole.

If there be only brother's and sister's children, tehy are excluded by the mother, the statute only admitting representation among brothers or sisters and the children of a deceased brother or sister.

In case there be a brother and the grand children of a deceased brother, the brother will for the same reason take the whole to the exclusion of the grand children.

2 Blackstone's Com. p. 517, note. Lovelass, p. 77, 80.

5. The grandfathers and grandmothers

231. 5. In default of the mother and brothers or sisters, the grandfathers and grandmothers take in equal shares; thus the paternal grandfather and the maternal grandmother will take equally, and both will exclude uncles and aunts, though they are related in the same degree, because the grand parents are ascendants, and the uncles and aunts only collaterals. The paternal grandfather will exclude the paternal grandmother, and the maternal grandfather will exclude the maternal grandmother, as the father exclude the mother.

Lovelass, p. 80.

6. Next of kin.

232. 6. In default of grandfathers and grandmothers the personal estate goes to every one of the next of kin who is related in an equal degree without distinctiou of sex;[a] without representation,[b] whether they be of the paternal or maternal, ascending or descending line.[c]

a. Thus the father's brother and the mother's sister take an equal share.

b. Thus the son of a deceased nephew will not represent his father and inherit with another nephew, but be totally excluded by him, on representation being admitted and the nephew's son being related in the third decree and the nephew in the second.

c. Thus the uncles and the aunts will take equal shares with the

Digitized by Google

nephews and the nieces; a paternal grandfather's brother will take an equal share with a sister's granddaughter.

CHAPTER VII.

On the Order of Succession according to the Portuguese Law.

233. The estate real and personal of Roman Catholics of Portuguese extraction is divided thus:

Order of succession according to the Portuguese Law.

1. If the deceased leaves issue and a wife, the wife takes half the estate, and the issue the other half among them in equal shares without distinction of sex.

2. If the deceased leaves no issue, the whole estate goes to the next of kin, and if there be more persons related in the same degree, they take in equal shares without distinction of sex. The wife is in this case excluded from all participation.

In conformity with a decree of the Portuguese Government, dated 18th May, 1832, which runs thus:

"When a person dies intestate the Judge convenes a meeting of the six nearest relations of the deceased, and, after listening to what proceeds in the meeting, divides the property to be distributed thus: half to be given to the widow, and the other half to the issues. If some of them are minors, Trustees, Guardians and Superiors are appointed to take charge of their portion until such time as they come of age. If the deceased dies without issue, the whole of the property is given to the nearest legitimate heirs, that is the next of kin. The widow has no share or part in it. If the issue be of age, a meeting is not convened. If the deceased dies leaving a Will, the Judge makes over the property according to the tenor and spirit of the Will to parties entitled. The issues of age and the widow are members of the meeting." There is no distinction of sex. Communicated to the author by the Reverend Simao da Conceicao, Superior of the Portugese mission of Bengal, see also S. D. A. Rep. vol. ii. p. 227.

CHAPTER VIII.

On the Rights and Obligations of the representatives of a deceased Person.

234. The estate of a deceased Mussulman devolves upon his executor, or, if none has been appointed, upon his heirs, who are considered to have accepted it, if they interfere with the estate (Sec. 57). The estate of a Hindu devolves upon the heirs

Rights and obligations of the deceased devolve upon the executors or heirs under Ma-

Digitized by Google

homedan Law, and upon the heirs under the Hindu Law.

without any express acceptance on their part;[1] the executors or the heirs are thus the representatives of the deceased, and all his rights and obligations devolve therefore upon them, except such as are merely personal.

Thus if the deceased has lent out money, his executor or heirs may recover it; if he has borrowed money, his executor or heirs must pay the debt; if he has received advances to perform a certain work, they must either perform the work or cause it to be performed, or return the advance, but if the deceased has contracted to marry a certain damsel, or engaged for personal service and attendance, the obligation is extinguished by the death of the stipulator, as the execution has become naturally impossible. Persons whom the deceased was bound to maintain, cannot demand maintenance from the executor or the heirs. (Sect. 208.)

1 Digest, book v. sect. 6.

but upon the administrator or executor, under the English Law.

235. The administrator or the executor, are the representatives of a deceased person according to English law, but never the heirs; the whole estate real as well as personal is, in India, assets in their hands, (Sect. 68,) and neither the creditors nor the heirs can demand a distribution of the estate till a year after the death of the deceased. 22 & 23 Car. ii. ch. 10.

Heirs may prosecute and be prosecuted even for penal damages.

236. If the deceased had instituted a prosecution for injuries to his person or property, the executor or the heirs are entitled to follow up the prosecution to recover damages, and vice versâ a complaint preferred against him may be followed up against them to recover damages, as far as they can be paid out of the property of the deceased. It is doubtful how far the executor and the heirs can *begin* such a prosecution, and vice versâ how far a prosecution can be brought against them, which had not begun in the lifetime of the offender;[1] but according to the general terms of Regulation 2, 1805, Section 7, it seems, that such suits can be instituted by, as well as against the executor or heirs, within one year after the cause of action took place.

But not to punishment.

That no prosecution can take place against the heirs for punishment follows of itself.

1 Colebrooke, Obligations and Contracts, p. 250.

The heir may renounce the inheritance.

237. The heir is not legally bound to accept the inheritance;

Digitized by Google

he may renounce it wholly or partly,[1] but according to Mahomedan Law he cannot renounce or transfer his inheirtance *before* the inheritor's death, as the right was not in existence at that time, and even if a consideration has been paid, it is invalid.[2]

But not before the inheritor's death.

1 Menu, book ix. sect. 207. Daya Bhaga, ch. iii. sect. 2, No. 28, 'he may take some trifle as a remuneration to debar future strife.' Colebrooke, Obligations and Contracts, sect. 51. Digest, book i. sect. 169.

2 Princ. Mahomedan Law, p. 90. S. D. A. Rep. vol. iv. p. 213.

238. Though the representatives of the deceased are entitled to recover what was due to him, the debtors are equally entitled to be satisfied before they make a payment, that the claimant is the real executor or the only heir; or if there be more heirs, that the claimant is empowered by them to collect the debts. Whenever therefore the debtor may have any reasonable doubt, payment may legally be withheld until the claimant produces a certificate, which empowers him to collect the outstanding debts of the deceased, or a Probate, or Letters of Administration, Reg. 20, 1841, Sect. 1. If the debtor withholds payment merely from fraudulent or vexatious motives, ibid, sect. 1, he will on the institution of an action, be liable for interests and costs.

The heirs, &c. may recover debts, but if the debtor object to their authority, they must obtain a certificate.

239. Such certificate may be obtained from the District or Zillah Judge on a petition by proving the title, Reg. 20, 1841, Sect. 2. The Judge may take security from the person to whom he grants the certificate, for rendering an account of debts received by him and for indemnifying those, who may be entitled to the whole or any part of the property. Ibid, sect. 3, 4.

Certificate obtainable from Zillah Judge.

who may take security.

240. The granting of the Certificate may be suspended by an appeal to the Sudder, which Court may declare the party to whom the certificate is to be granted, or direct further investigation of the title. The Sudder Court may supersede the certificate granted by the Zillah Court and grant a fresh one; this certificate will not effect any payments made to the person to whom the former certificate was given without notice that it had been superseded, but will entitle the holder to receive all monies recovered under the first certificate by the person holding it. Reg. 20, 1841, Sect. 5.

Appeal to Sudder.

241. Such certificate is of authority throughout the presidency, and if two certificates, or a certificate in the Zillah and a Probate or Letters in the Supreme Court in igorance of a previ-

Certificate is of authority throughout the Presidency.

Digitized by Google

If two have been granted, the later invalid.

ous certificate, had been granted, that which had been obtained last is invalid ;—but should the Probate or Letters have been granted by the Supreme Court, though at the time no assets of the deceased were within the jurisdiction of the Court, the certificate, though granted at a later period, is valid. Reg. 20, 1841, Sects. 8 to 11.

It gives full security to the payer.

A certificate, or legal Probate, or Letters of Administration, affords the debtors full security for any after claim from other parties, even if payment is made under a *latter* certificate in ignorance of the grant of a previous certificate. The person entitled to the property may recover it from the holder of the certificate. Reg. 20, 1841, Sect. 4, 12.

British subjects must obtain Probate or Letters.

242. The heirs of British subjects cannot demand payment of debts without having obtained Probate or Letters of Administration from the Supreme Court (Sect. 54), and the Zillah Court cannot grant any certificate to such heirs, even if the property is within their jurisdiction. Reg. 20, 1841, Sect. 19.

Obligations of heirs.
1. Payment of funeral expenses.

243. The first duty of the executor or heirs is to see the funeral of the deceased performed suitably to his rank ; the expense of it is payable out of the estate before all other debts,[1] but in the case of Hindus, this preference is only given to the first expenses for the burning of the body and for the performance of the customary funeral rites, not for expenses incurred in the future monthly or annual Sradhas, because the performance of them is only a moral duty, whereas the payment of a debt is a legal duty.

[1] Sirajjyyah. Baille, p. 1. 2 Blackstone's Com. p. 508.

2. To make an inventory is not absolutely necessary.

244. It is not prescribed that the executor or the heirs shall make an inventory of the estate of the deceased, nor is it necessary, when the estate is solvent and the heirs are of age, present, and all parties agree amongst themselves ; but if the estate is insolvent, the neglecting to take an inventory, though not conclusive against the executor or the heirs, will expose them to the imputation, that there have been sufficient assets, and if any of the heirs is a minor or absent, the executor or the heir in possession would be made liable for the *highest* value at which the assets might reasonably be estimated, because the want of proof can only be ascribed to him.

Digitized by Google

245. The executor, or the heirs, are next to pay all the legal debts of the deceased as far as there are assets. If all the creditors cannot be satisfied, they ought to be paid in equal proportions, except : I. that a proprietor has preference over any other debtor, even over a mortgagee, for arrears of rent due to him for the current year, the property in the house, or the crops growing, or grown upon the lands, being considered as mortgaged to him in the first instance. Reg. 7, 1799, Sect. 3, Cl. 9. Reg. 8. 1819, Sect. 8. Const. 33, 21st January, 1808 ; Const. 343, 19th April, 1822. 2. That a mortgage creditor is entitled to full payment by the realization of the mortgaged property before any other simple creditor ; Const. 935, 22d February, 1835, Const. 1056, 21st October, 1836 ; and the mortgager, whose claim is registered, has preference over one, whose claim is unregistered, Reg. 36, 1793, Sect. 6, Cl. 1. Ben. Reg. 28. 1795, Sect. 2. Ced. Prov. Reg. 17, 1803, Sect. 6, Cl. 1. Whether the debt was contracted at an earlier or later period, or whether it was in writing or verbal, makes no difference,[1] but when a creditor obtains a decree, and follows it up by process of attachment, he obtains thereby preference over the creditor, who has not instituted a prosecution, or followed it up by attachment. Const. 935, 22d February, 1835.

3. To pay the debts as far as there are assets.

All creditors have an equal right.

Except,
1. Proprietors for arrears of rent.
2. Mortgagees.
3. Decree-holders with attachment.

A debt incurred during health is, according to Mahomedan Law, preferred to one of which there is no other evidence than the acknowledgment of the deceased on his death bed ;[2] and a religious vow, or the promise of a charitable donation, is according to Hindu Law, a debt payable only after all the legal creditors have been satisfied.[3] All gifts upon death bed, even when delivery has taken place, are invalid against creditors. (Sects. 260, 305, 313.)

Gifts on death-bed.

[1] Sirajiyyah. Princ. Mahomedan Law, p. 345. Bailie, p. 2.

[2] Hedaya, vol. iii. p. 163.

[3] Catyayana, Digest, book i. Sect. 195.

264. The whole estate, real as well as personal, of British subjects, is liable for their debts, 9 George iv. Sect. 33, but certain creditors have, according to the English Law, preference over other creditors in case they cannot all be satisfied. The debts are to be paid in the following order.[1]

According to *English Law*, certain creditors must be paid before others.

1st. Funeral charges and the expense of proving the will.

Digitized by Google

2d. Debts due to the King on record or specialty, or which are preferred by special statutes, as money due on poor rates, postage, &c.

3rd. Registered debts and debts for which there has been a decree.

4th. Debts due on special contracts, as for rent, or upon bonds or contracts under seal and mortgages.

5th. Debts on simple contracts, viz., upon notes unsealed and verbal promises, amongst which servants wages are by some preferred.

Among debts of equal degree, the administrator is allowed to pay himself first, as long as no suit is commenced.[2]

1 2 Blackstone's Com. p. 511. Lovelass, p. 51.

2 2 Blackstone's Com. p. 511.

Debts when to be paid.

247. The executor, or the heirs, are bound to pay the debts of the deceased before making any division of the property,[1] and without applying any part thereof to their own use, or to the benefit of those whose maintenance depended on the deceased during his lifetime, for instance, his wife, children, aged parents, &c., because this was only a personal duty. (Sect. 208.) If any part of the Estate has thus been applied to the detriment of the creditors, it should be restored by the person on whom the duty of maintaining these persons has devolved. As the heirs are *bound* to pay the debts, they become jointly and severally responsible for any debts *known* to them and unpaid on partition.

1 Hedaya, vol. iii. p. 209, vol. iv. p. 30. Daya Crama Sangraha, ch. vii. No. 27. Nareda, "What remains of the paternal inheritance *over and above* the father's obligations, and *after* payment of his debts, may be divided by the brethren, so that the father continue not a debtor." Vrihaspati, Digest, book v. sect. 100.

No remedy by law to force creditors to appear.

248. There is however no provision made by law to enable the executor, or the heirs, to ascertain the extent of the debts of the deceased, and to cause the creditors to appear before a partition is made, (Sect. 62). The executor, or the heirs, seem entitled and bound to pay the creditors in full as they appear, as long as there are assets, and the creditor who appears last will thus be subject to the whole loss occasioned by the insolvency of the estate; on the other hand, a creditor may, if he pleases, postpone coming forward, and is only precluded from preferring his claim

Digitized by Google

under the general rules of limitation, if there be assets in the hands of the executor or the heirs.

Under the English Law, the creditors cannot demand payment from the executor or administrator till one year after the death of the deceased, (Sect. 63), and if they do not appear till after that time, they can only recover proportionally from the person from whose shares the debt would have been paid, if they had appeared in time.

[s] Blackstone's Com. p 518. Toller, p. 841, 813.

All debts are due on the death of the debtor.

249. All debts fall due *at the time of the debtor's death*, even if postponement of payment had been granted to the deceased; thus, if money was borrowed on the condition of being paid a year after, and the debtor dies two months after having borrowed the money, the money must be paid immediately on his death; or if it was agreed that the debt should be paid by instalments, the whole debt will still be due on his death, because the postponement was a *personal* right of the debtor, which expires with him.[1]

Jowhurruh-oon-Nuyyeral. Bailie, Appendix 8, (See also sect. 247, note 1).

Debts unpaid on partition.

250. The creditors should therefore demand payment *immediately* on the death of the debtor, and if they allow the estate to be divided, and the debt *was unknown* to the executer and the heirs, it is equitable, that the heirs should only be made responsible in proportion to their respective shares, and that the one should not be responsible for the other.

1 Yet this is doubtful. If a debt be proved against the Estate after partition, it is the rule according to Mahomedan Law, that the partition is invalid. Hedaya, vol. iv. p. 30, each heir seems therefore liable to return what he has received; but under the Hindu Law, the partition remains valid. (Sect. 209, note 2).

Heirs liable as far as there are assets.

Exceptions under Hindu Law.

1. Sons responsible for father's debts.

251. From the general rule that the heirs are only liable for the debts of the deceased, as far as there are assets, there are the following exceptions under the Hindu Law.

1. A *son* must pay the debt of his father,[1] and mother,[2] with interest, whether there are assets or not.[3]

As long as the sons live undivided, the *whole* debt can be claimed from any of the sons, but after division, each of them is only responsible for his proportional share.[4] Thus, if there be 3 sons, each shall pay one-third, but if one of them is unable to

Digitized by Google

pay, the others are not legally bound to pay his share. Yet if the debt originates in sums expended *for the use of the family*, the whole can be demanded from any of the family, divided or undivided.[5]

The liability extends only to just and reasonable debts,[6] not to money due for spirituous liquor, for losses at play, for promises made without consideration, or under the influence of lust,[7] or of wrath, or for sums for which he was a surety.

But in joint debts only for his share.

If the debt is one contracted *jointly* with others, for which the father consequently could be held solely responsible, the sons are only responsible for their father's share.[8]

1 Çatyayana, Digest, book i. sect. 173, "the Judge shall compel a son to pay the debt of his father, provided he be involved in no distress, be capable of property, and liable to bear the burden; but in no other case shall he compel the son to pay his father's debt." Vrihaspati, Digest, book i. sect. 167. Digest, book i. sect. 170. Retnacara. Digest. book v. sect. 372. Princ. Hindu Law, vol. i. p. 106. Strange, vol. ii. p. 274 seq.

2 Mitacshara on Inheritance, ch. i. sect. 3, No. 8 to 10. "A debt incurred by the mother must be discharged by the sons, if above the value of her peculiar property, but under that value, the daughters must pay out of that property."

3 According to Sir William Jones, the son and grandson are only under a *moral* obligation, where there are no assets, see Digest, book i. sect. 167, note; and Yajnyawalcya, (Digest, book i. seet. 229.) "a debt secured merely by a written contract shall be discharged from a moral and religious obligation only by three persons, the debtor, his son and his son's son, but a pledge shall be enjoyed until actual payment of the debt by any heir in any degree." See also Colebrooke, in Strange, vol. ii. p. 275.

4 Nareda, Digest, book i. sect. 169. Vishnu, Digest, book i. sect. 185.

5 Menu, Digest, book i. sect. 186.

6 Menu, book viii. sect. 162. Catyayana, Digest, book i. sect. 197, 200. Vrihaspati, Digest, book i. sect. 201. Gotama, Digest, book i. sect. 202. Vyasa, Digest, book i. sect. 203. Yajnyawalcya, Digest, book i. sect. 205. Princ. Hindu Law, vol. ii. p. 280.

7 Catyayana, Digest, book i. sect. 204, "what a man has promised with or without a writing to give to a woman, who had another husband before, let a Judge consider as a debt contracted under the influence of lust, but what has been promised to gratify resentment by hurting another, or destroying his property, let the Judge consider as a debt incurred under the influence of wrath."

8 Catyayana, Digest, book i. sect. 184.

Minor son first liable when he comes of age.

252. A minor son and *his* estate, is not liable for the debt of his ancestors until he comes of age;[1] when therefore the creditors allow the minor son to take possession of his father's estate, they

Digitized by Google

must wait for payment until he comes of age. This favour is granted to afford him an opportunity of making his objections when he attains his Majority,[2] and the inconvenience to the creditors, is fully repaid in making the son liable for the payment of all just debts, though there are no assets.

1 Catyayana, Digest, book i. sect. 187. Princ. Hindu Law, vol. i. p. 111, vol. ii. p. 277.

2 Colebrooke, Obligations and Contracts, sect 585.

253. 2. A son's son must pay his grandfather's debts in the same manner, and under the same circumstances, as the son, but without interest.[1] The great-grandson is not answerable.

2. Son's son liable for grandfather's debts.

1 Catyayana, Digest, book i. sects. 197, 198. Nareda, Digest, book i. sect. 199

2 Nareda, Digest, book i. sect 199. Catyayana, Digest, book i. sect. 196.

254. No other person than the executor, or the heirs of the deceased, are responsible for his debts,[1] and though the Head of the family is responsible for all debts incurred by the different members for their support,[2] yet, the husband is not generally responsible for the debts of his wife;[3] (unless she assists in supporting the family,[4] when it becomes joint by that circumstance), nor the wife for the debts of her husband,[5] nor the father or the mother for the debts of their son,[6] except: 1. They have promised to be responsible,[7] or 2. the debt was contracted by them jointly.[8]

Husband, Wife, Father and Mother not generally liable.

1 Hedaya, vol. iv. p. 80. Princ. Mahomedan Law, p. 88. Vishnu, Digest, book i. sect. 220, "He who takes the assets of a man leaving no male issue must pay the sum due by him." Digest, book i. sect. 172. Colebrooke, in Strange. vol. ii. p. 282.

2 Hedaya, vol. i. p. 397; vol. ii. p. 628. Menu, book viii. sect. 167. Menu, Digest, book i. sect. 190. Nareda, ibid, book i. sect. 191, 209. (See note 3). Vishnu, ibid, book i. sect. 192, Catyayana, ibid, book i. sect. 193. Princ. Hindu Law, vol. ii. p. 279, 283, 301.

3 Princ. Mahomedan Law, p. 57, 154. Nareda, Digest, book i. sect 209. "A debt contracted by the wife shall by no means bind the husband, *unless* it were for necessaries at a time of great distress: a man is indispensably bound to support his family." Yajnyawalcya, Digest, book i. sect. 207. (see note 6.) Catyayana, Digest. book i. sect. 211. (See note 8.)

4 Vrihaspati, Digest, book i. sect. 217, "the husband, being a vinter, a hunter, or fowler, a washer, a herdsman, a shepherd, or the like, shall pay the debt of his wife: it was contracted in the concerns of her husband."

5 Noor Jehun Begum *versus* Pran Sukh, S. D. A. Rep. vol. iv. p. 161. Yajnyawalcya, Digest, book i. sect. 207. (See note 6). Colebrooke, in Strange, vol. ii. p. 280.

Digitized by Google

6 Yajnyawalcya, Digest, book i. sect. 207, "neither shall a wife or a mother be in general compelled to pay a debt contracted by her husband, or son, nor a father to pay a debt contracted by his son, unless it were for the behalf of the family; nor a husband to pay a debt contracted by his wife." Vishnu, Digest, book i. sect. 208.

7 Catyayana, Digest, book i. sect. 215, "by the general rule of the law a father need not pay the debt of his son, but he must pay it, if either at the time of the loan, or afterwards, he promised payment."

8 Catyayana, Digest, book i. sect. 211, "a debt contracted *jointly* with her husband or son, or singly by the woman herself, shall be paid by a wife or mother; in such, and in no other case, shall the debt contracted by them be paid by her." Yajnyawalcya, Digest, book i. sect. 210.

Under the Hindu Law.

255. Under the Hindu Law the follwing are also responsible:

1. The wife and mother when liable.

1. The *wife* and the *mother* for the debts of their husband or son, when contracted on behalf of the family.[1]

2. Husband's heirs answerable for the debt of the widow.

2. The heirs of the husband of a widow for debts contracted *by her*; 1. for necessary disbursements to save the estate, for instance, for the payment of Government rent; 2. for the support of her and the family; 3. for promoting her husband's spiritual welfare; and 4. for the due execution of any conditions made by her husband; because for all such debts the property might have been legally sold, and consequently lost to the heirs of the husband. All her other debts must be paid by the heirs to her peculiar property.[2]

3. Protector and gallant of childless widow answerable for husband's debt.

3. The protector of the wife of a childless widow, able to acquire money, and he who keeps her as a concubine, must pay her husband's debts because he obtains benefit from her, or has the enjoyment of her.[3]

1 Yajnyawalcya, Digest, book i. sect. 207. (Sect. 254, note 6.)
2 Princ. Hindu Law, vol. ii. p. 284.
3 Nareda, Digest, book i. sect. 223, 226. Catyayana, Digest, book i. sect. 222, 227. Yajnyawalcya, Digest, book i. sect. 171, 172.

Digitized by Google

BOOK III.

ON GIFTS.

1. *On the requisites to a Gift.*

256. A gift is a transfer of property made without any exchange.[1] What a gift is.

Gift for a consideration is a sale.

The donor's resigning his right without receiving any consideration from the donee, is a gratuitous act; should the donee give some, but not full, consideration, the contract is partly a sale, and partly a gift; and if full consideration be given, the contract is a sale, and must be treated as such, though it has been denominated a gift.[2] Thus a Hiba-bil-Iwuz is in fact a sale, and therefore valid according to Mahomedan Law, even though seizin (Sect. 258) has not taken place.[3]

[1] Hedaya, vol. iii. p. 290, seq. Princ. Mahomedan Law, p. 50. Digest, book ii, ch. iv.

Dower is not a gift.

Dower is not, according to Mahomedan Law, a gift, but a consideration paid, or stipulated to be paid, for the consummation of marriage; a transfer in consideration of dower is a payment of debt, not a gift, though it may have been called so in the contract. Seizin is therefore not requisite.

[2] Any consideration, however inconsiderable, will transfer a gift into a sale under the Mahomedan Law; see Hedaya, vol. iii. p. 306. Princ. Mahomedan Law, p. 217. Mirza Bebee *versus* Toola Bebee, S. D. A. Rep. vol. iv. p. 334. Imdad Ali *versus* Kadir Buksh, ibid, vol. v. p. 326.

[3] Meer Nujeeb Ullah *versus* Kuseema, S. D. A. Rep. vol. i. p. 10. Princ. Mahomedan Law, p. 221.

Gifts valid by tender and acceptance according to natural law.

257. A gift according to natural law, is, rendered valid by tender and acceptance, as other contracts, and may either be made so that the transfer shall take place immediately; *or*, be postponed until a future time; *or*, be dependant upon certain conditions. If neither term, nor condition, is annexed to the gift, the delivery by the donor, and the seizin by the donee, will generally follow immediately upon the acceptance, but if this should not have been the case, the delivery may be inforced at any fu-

Digitized by Google

ture time, provided the existence of the contract can be clearly established. The want of delivery at the time, when delivery generally takes place, goes far to prove, that either no gift was made, or that it was conditional.

According to the Mahomedan Law, seizin is also requisite.

258. According to the Mahomedan Law, *seizin* is absolutely necessary to the validity of a gift, partly because the Prophet has said: "A gift is not valid without seizin," and partly because gifts are voluntary act and ought not therefore to be enforced.[1] The seizin is to follow immediately upon the acceptance, yet, when possession is taken afterwards *with* the consent of the donor, the gift is considered valid.[2] If the donee only takes possession for a *short* time, the gift is valid, and continuance of possession is not necessary. For instance, if a wife makes a gift of landed property to her husband, and the husband takes possession of it for a short time by managing the estate in his own name, the gift is valid and irrevocable, though the wife should afterwards manage the estate in her own name.[3]

and must follow immediately upon acceptance.

1 Hedaya, vol. 3. p. 292. Princ. Mahomedan Law, p. 215. S. D. A. Rep. vol. i. p. 5. Casim Ali *versus* Furzund Ali, ibid, vol. i. p. 113.

2 Hedaya, vol. iii. p. 293.

3 Jafier Khan *versus* Hubshee Bebee, S. D. A. Rep. vol. i. p. 12.

Conditional gifts invalid under the Mahomedan Law.

259. All conditional gifts are therefore invalid under the Mahomedan Law; if seizin has taken place, the condition is invalid, and the gift cannot be resumed on account of non-fulfilment of the condition; and if seizin has not taken place, the gift is invaild.[1] Thus, in a gift on the condition that the donee shall support the donor during his life time, the gift is valid, but the condition invalid. What has been given can neither be resumed in case of non-fulfilment, nor can the fulfilment of the condition be enforced.

If the property is not to be delivered till after the fulfilment of the condition, and the donee according to the condition is to give or to do some thing; for instance, if it is contracted between A. and B., that A. shall take B's property *after* his death, provided A. supports him during his lifetime; the contract is not a gift, but rather a sale, or a transfer for a consideration, (Sect. 256,) which may be enforced after the fulfilment of the condition.

1 Hedaya, vol. iii. p. 308. Princ. Mahomedan. Law, p. 50, 214.

Digitized by Google

260. A gift which is not to take effect till the death of the donor, is invalid, partly on account of a saying of the Prophet, partly because the suspension of the conveyance of the property makes the contract doubtful and uncertain, and therefore null.

Conditional gifts invalid under the Mahomedan Law,

Hedaya, vol. iii. p. 130.

261. Under the Hindu Law a gift is established by the contract alone, and it is not necessary that seizin should immediately follow upon acceptance.[1] A conditional gift is valid. A gift whose effect is suspended until the conditions are fulfilled, may be enforced on the occurrence of that event; and a gift made on certain conditions to be accomplished by the donee, may either be revoked on non-fulfilment of the conditions, or the conditions may be enforced.[2] A gift, which is to take effect at a future period, for instance, on the death of the donor, is valid, and the giver has no power to altar or revoke the gift without the consent of the other party.[3]

and gifts to take effect on the death of the donor are invalid.

[1] Daya Bhaga, ch. i. No. 21. Harita, Digest, book ii. ch. iv. sec. 40. "He who gives not what he has *promised*, and he who takes back what he has given, sinks to various regions of torment, and springs again to birth from the womb of some brute animals." Yajnyawalcya, Digest, book ii. ch. iv. sect. 32. "Let the acceptance be public, especially of immoveable property and delivering of what may be given, and *has been promised*, let not a wise man resume the donation." Catyayana, book i. sect. 195; book ii. ch. iv. sect. 3, "*what a man has promised* in health, or in sickness, for a religious purpose must be given, and if he dies without giving it, his son shall doubtless be compelled to deliver it." Ibid, book v. sect. 369. "After delivering what is due as a friendly gift promised by the father, let the remainder be divided among the heirs." *Dhaumya*, Digest, book v. sect. 2. "On failure of the proper object, how shall a present be disposed of, which was bestowed on an absent person? Let *it be delivered* to kinsmen sprung from the same original stock, or on failure of these, to his distant kindred." Yajnyawalcya. "A title deed estsblishes a stronger right than occupancy, unless the latter has existed through successive generations."

[2] Menu, book viii. sect. 212. (Digest, book ii. ch. iv. sect. 48,) should money or goods be given or promised as a gift, by one man to another, *who asks it for some, religious acts*, the gift shall be void, if that act be not afterwards performed." Princ. Hindu Law, vol. ii. p. 223, 237, yet see Halhed, p. 152, "if it be not for a religious account, they shall not give it."

[3] Nareda:—"the sages have declared unalienable even by a man oppressed with grievous calamities, *and of course what has been promised to another*." Digest, book ii. ch. 4, sect. 4. Princ. Hindu Law, vol. ii. p. 208.

Digitized by Google

2. *Who can make Gifts.*

Who can make gifts. Minors.

262. Every person able to contract,[1] is generally able to make gifts. A minor,[2] or one of unsound mind,[3] cannot make gifts. Sickness and even mortal disease does not make a gift void, if the donor at the time was of sound mind;[4] but by Hindu Law a gift made by a person afflicted with an incurable distemper, is void, as his equanimity is considered to be disturbed;[5] or if made under the influence of lust or anger.[6] A married woman both under the Mahomedan and the Hindu Law, can make gifts of her own property without her husband's consent;[7] his consent is only required by the Hindu Law, to gifts of immoveable property, received from him;[8] such property she has no right to dispose of even after his death.[9]

Persons of unsound mind.

Married women.

1 Colebrooke, Contracts and Obligations, sects. 52 to 65.

2 Hedaya, vol. iii. p. 471. Menu, book viii. sect. 163. Nareda, Digest, book ii. ch. 4. sect. 53.

3 Hedaya, vol. iii. p. 471. Menu, book viii. sect. 163. Nareda, Digest, book ii. ch. 4, sect. 53.

4 Radamoney Deby *versus* Samchunder, S. D. A. Rep. vol. i. p. 85. Princ. Hindu Law, vol. ii p. 219, 246. Hedaya, vol. iv. p. 503. By Mahomedan Law a gift on the death-bed, (that is, made during an illness from which the donor does not recover) is viewed in the light of a legacy. Hedaya, vol. iii. p. 162; vol. iv. p. 503.

5 Menu, book viii. sect. 163. Nareda, Digest, book ii. ch. 4, sects. 53, 54. Colebrooke, Contracts and Obligations, sect. 645. Mitacshara on Inheritance, ch. i. sect. 2, No. 14.

6 Nareda, Digest, book ii. ch. 4, sect. 53. Catyayana, book i. sect. 204. Mitacshara, on Inheritance, ch. i. sect. 2, No. 14. Daya Crama Sangraha, ch. vi. No. 14. Bhowanny Churn Banurjee *versus* Ramcanto Banurjee, S. D. A. Rep. vol. ii. p. 202.

7 Princ. Mahomedan Law, p. 154, 254. Digest, book v. sect. 88.

8 Daya Crama Sangraha, ch. ii, sect. 2, No. 26. Daya Bhaga, ch. iv. sect. 1, No. 21. Digest, book v. sect. 476.

9 Daya Bhaga, ch. iv. sect. 1, No. 23. Nareda, Daya Crama Sangraha, ch. ii. sect. 2, No. 31. "What has been given by an affectionate husband, she may consume as she pleases, when he is dead, or may give it away, except immoveable property." S. D. A. Rep. vol. ii. p. 314.

No restrictions for gifts to wife, children and relatives.

263. There are no restrictions with respect to gifts to wife, children and relatives, they are rather looked upon favourably, as their object is increase of affection.[1] It is considered impro-

Digitized by Google

per to give more to one child than to another, but it is not illegal[2] and even if such gifts should afterwards be found to have been detrimental to the interest of the creditors of the donors they are valid,[3] provided they were made in good faith, and not to deceive the creditors.[4]

1 Hedaya, vol. iii. p. 302. Princ. Mahomedan Law, p. 198, 237. Dacsha, Digest, book ii. ch. 4, sect. 51, "presents given to a mother, a father, a spiritual teacher, a friend, a moral man, a benefactor, an indigent or unprotected person, and a learned man, are productive of benefit."

2 Princ. Mahomedan Law, p. 226. Yajnyawalcya. Digest, book v. sect. 26.

3 S. D. A. Rep. vol. i. p. 152, Note.

4 Hedaya, vol. iv. p. 475. Menu, book viii. sect. 165. Princ. Hindu Law, vol. ii. p. 248.

By Hindu Law, a father may separate his sons and make a partition of his estate.

264. Though it is customary for a Hindu family to live in a state of union as it regards board, property and religious ceremonies, a father may, if he chooses,[1] separate his children and make a division of his property among them. Such division may be made by him at any time, except when ancestorial immoveable property is to be divided, it being then necessary, that his wife should be past childbearing.[2] If the division is not carried into effect during the lifetime of the father, it is invalid and without effect.[3]

1 Daya Bhaga, ch. ii. Nos. 4, 8, 20. Daya Crama Sangraha, ch. vi. No. 1. Mitacshara on Inheritance, ch. i. sect. 2, No. 1.

2 Daya Bhaga, ch. ii. Nos. 1, 7. Daya Crama Sangraha, ch. vi. No. 1. Nareda, Digest, book v. sect. 98. Mitacshara on Inheritance, ch. i. sect. 2, No. 7.

3 Daya Bhaga, ch. i. No. 38. Bhowany Churn Banurjee *versus* Ramcanto Banurjee, S. D. A Rep. vol. ii. p. 202.

According to the Bengal school, the partition may be *unequal*, except of immoveable ancestorial property.

265. According to the Bengal school, the father may make an *unequal* division of property acquired by himself exclusively,[1] as well as of *moveable* ancestral property,[2] and property of whatever description recovered by himself,[3] retaining in his own hands as much as he may think fit,[4] but ancestral *immoveable* property,[5] and property to the acquisition of which his sons may have contributed,[6] must be divided into *equal* shares among the sons, and the father can only retain a double share.[7]

According to the Benares and Mithila school, all ancestorial and immovea-

According to the Benares and Mithila school an *unequal* distribution of ancestral property of whatever description,[8] as well as of immoveable property acquired by himself,[9] is illegal, and even,

ble property must be divided into equal shares.

on a distribution of his own personal acquisitions, he cannot reserve more than two shares for himself.[10]

1 Vishnu. "when a father separates his sons from himself, his will regulates the division of his own acquired wealth." Daya Crama Sangraha, ch. vi. No. 2. Nareda, ibid, ch. vi. No. 12, "*for* the father is lord of all." Daya Bhaga, ch. ii. No. 16. Digest, book v. sects. 24, 32.

2 Yajnyawalcya: "the father is master of the gems, pearls and corals and of *all* (other moveable property), but neither the father, nor the grandfather is so of the whole immoveable estate." Digest, book ii. ch 4, sect. 13. Daya Crama Sangraha, ch. vi. No. 19. Daya Bhaga, ch. ii. Nos. 22, 75. Vishnu, Digest, book v. sect. 25.

3 Daya Bhaga, ch. ii. No. 21.

4 See Note 1. Daya Bhaga, ch. ii. No. 55.

5 Vrihaspati; "in wealth acquired by the grandfather whether it consists of *moveables* (that is, according to the Bengal school "slaves") or of immoveables the equal participation of father and of son is ordained." Daya Bhaga, ch. ii. No. 50. Yajnyawalcya: the ownership of father and son is the same in land, which was acquired by his father, or in a corrody, or in chattels. Daya Crama Sangraha, ch. vi. No. 18. Bhowanychurn Banurjee *versus* Ramcanto Banurjee. S. D. A. Rep. vol. ii. p. 202. Princ. Hindu Law, vol, i. p. 7; vol. ii. p. 146. An *unequal* division of ancestorial immoveoble property was formerly held to be vaild, see Eshanchunder Roy *versus* Eshwurchunder Roy, S. D. A. Rep. vol. i. p. 2. Ramcoomar Neaee Bachesputtee *versus* Kishenkinkur Turka Bhoosun, ibid, vol. p. 42.

6 Menu, book ix. sect. 215. Digest, book v. sect. 29. Daya Bhaga, ch. ii No. 86," if among undivided brethren, living with their father, there be a common exertion for common gain, the father shall never make an unequal division among them, when they divide their familes." Menu, Digest, book v, sect. 73.

7 Vrihaspati: "the father may himself take two shares at a partition made in his lifetime," and Nareda: "let the father making a partition, reserve two shares for himself." Daya Bhaga, ch. ii. No. 35; ch. ii. Nos. 20, 33, 54. Catyayana: "a father takes either a double share, or a moiety of his son's acquisitions of wealth, and a mother also, if the father be deceased is entitled, to an equal portion with a son." Daya Bhaga, ch. ii. Nos. 65, 73, (see Sect. 200.)

8 Mitacshara on Inheritance, ch. i. sect. 2, No. 8. Vrihaspati, (see note 5.) Daya Bhaga, ch. ii. No. 51, note. Sham Sing *versus* Umraotee, S. D. A. Rep. vol. ii. p. 74

9 Mitacshara on Inheritance, ch. i. sect. I, No. 27. Vyasa: though immoveables, or bipeds, have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons; they who are born, and they who are yet unbegotten, and they who are still in the womb, require the means of support; no gift or sale should therefore be made." Princ. Hindu Law, vol. ii. p. 233. Strange, vol. ii. p. 10.

10 Princ. Hindu Law, vol. i. p. 44.

On a division among sons, the childless wife

266. When a father makes a division of his property among his children, the childless wife, not she who has male issue, is en-

Digitized by Google

titled to a share equal to that of a son.[1] Where the father gives an equal share to his sons, he is to give an equal share to a wife, but where he gives unequal portions, and reserves a larger share for himself, he is bound to allow to each of his wives, from the property reserved by himself, as much as may amount to the average share of a son.[2]

must have a share.

These shares to wives are allotted only in case of no property having been given to them;[3] if the wife has received from any quarter wealth, which would have devolved ultimately on her husband, such wealth is included in her allotment; but if the property was received from her own father, or other relative, or from her maternal uncle, or other collateral kinsman of her husband, it is not included, as her husband has no interest therein.[4]

1 Vyasa, (Daya Crama Sangraha, ch. vi. No. 22.) "Even childless wives of the father, are pronounced equal sharers;" and the paternal grandmothers, are declared equal to mothers. Daya Bhaga, ch. iii. Sect. 2, No. 32. Mitacshara on Inheritance, ch. i. sect. 2. No. 8.

2 Daya Crama Sangraha, ch. vi No. 27. Mitacshara on Inheritance, ch i. sect. 2, No. 10.

3 Yajnyawalcya, "if he makes the allotments equal, his wives, to whom *no* separate property has been given by their husbands, or their father-in-law, must be rendered partakers of like portions." Daya Crama Sangraha, ch. vi. No. 24. Daya Bhaga, ch. iii. sect. 2, No. 31.

4 Juganatha, Digest, book v. sect. 87. Sri Krishno holds: that in the case of peculiar property having been given, she should by the rule of analogy, observed in the case of a superseded wife, only receive half a share. Daya Crama Sangraha, ch. vi. No. 28.

267. According to the Benares and Mithila school, in case of an *equal* partition made by a father among his sons, his wives, who are destitute of male issue, take equal portions;[1] where he reserves a large portion for himself, his wives are not entitled to any specific share, but must be maintained by him; and where unequal shares are given to sons, the average of the shares of the sons should be taken for the purpose of ascertaining the allotments of the wives.[2]

According to the Benares and Mithila school.

1 Mitacshara on Inheritance, ch. i. sect. 2, No. 8. Princ. Hindu Law. vol. i. p. 47.

2 Mitacshara on Inheritance, ch. i. sect. ii. No. 10.

268. The same rules apply also to paternal grandmothers in case of partition of ancestral property.

paternal grandmother also entitled to a share.

Vyasa, (Sect. 266, Note 1.)

Digitized by Google

3. *Who can receive Gifts.*

Who can receive gifts.

269. Every person who is of sound mind, can receive a gift, whether he be of age, or a minor, if he is only able to declare his acceptance thereof; and as the contract is beneficial to the donee the father or mother can accept a gift for their child,[1] and the guardian for his ward, if they are unable to give their assent.[2]

To save the Natives a useless expense, and to prevent extortion by menial servants, *public servants* are forbidden to receive Nuzzurs in money, or trays of fruits, and other articles, on the occasion of official or complimentary visits. Govt. Order, 2d June, 1829.

1 The father or mother can even, under the Mahomedan Law, make gifts to *their* infant children of things in their possession, the father or mother takes seizin, as the guardians of their children. Hedaya, vol. iii. p. 296. Princ. Mahomedan Law, p. 232.

2 Hedaya, vol. iii. p. 297. Princ. Mahomedan Law. p, 206, 212, 224. Princ. Hindu Law, vol. ii. p. 231, 243. It has now been decided, that a stranger, in whose house the minor resides, can accept for the minor, *even* when the father is alive. Banoo Bebee *versus* Fuckerooden Hussein, S. D. A. Rep. vol. ii. p. 180.

4. *What can be the subject matter of Gifts.*

What can be the subject matter of gifts.

270. Whatever can be the subject matter of contracts in general,[1] can also be the subject of a gift. Not only the thing itself, but the use and possession thereof may be given. No one can of course give away what does not belong to him,[2] nor more than that which belongs to him,[3] nor what is merely a personal right, for instance, an office, a pension, sacrificial fees,[4] &c. A Hindu widow[5] cannot make any gift from her husband's estate, nor from the profits accruing therefrom, nor from her own acquisitions made by means of such property, or its profits,[6] for *worldly* purposes,[7] without the consent of her husband's heirs,[8] or unless specially empowered by her husband,[9] because she has only a life-interest in such property. (Sect. 165.) Even a gift with the consent of the nearest heir at the time, is not irrevocably valid, as it may happen that he may not be so, at the time of her decease.[10] As the life-interest is only given her for a special purpose, viz., for her maintenance and for the spiritual benefit of her husband, she cannot even transfer

Gifts by a Hindu widow from her husband's estate.

Digitized by Google

the use or the possession of such property during her lifetime; her right is absolutely personal.[11]

Gifts by childless wife and mother of the portion received on partition.

A childless wife, receiving a portion on a partition by the father among his sons (Sect. 266), and a mother, receiving a portion on a partition among her sons after their father's death, (Sect. 199), are allowed to dispose of such portion by gifts or will, because though it was given for their maintenance, the law entitles them to the portion wihout fixing any restriction on the use of it,[12]

Gifts by Zemindars of lands rent free.

A Zemindar cannot grant lands rent free to Pagodas, Mosques, &c., or to private individuals, beyond the term of his own possession or that of his heirs, without the consent of Government, because the annual jumma, to be paid from the lands, is a right belonging to Government, and it is only the collection and enjoyment of the rent that is granted to the Zemindar during his possession on payment of the rent assessed upon the whole estate. Reg. 1, 1793, Sect. 10. Ced. and Conqr. Prov. Reg. 47, 1803, Sect. 3.

Gifts by managers of endowed property.

A manager of endowed lands or property cannot alienate such property by gifts, or otherwise, as the property belongs to the institution, not to the manager,[13] but if the endowment was only a *nominal* one, it may be transferred by gifts. (Sect. 205.)

Gifts of the entire property.

A gift of the entire property, except of immoveable ancestorial property under the Hindu Law, when the owner has any male descendant, (Sect. 273) is valid.[14] The donor acts sinfully, if he should thereby leave his family unprovided for, but still the gift is valid,[15] yet as nobody except a fool, a mad man, or a defrauder is likely to give away his whole property during his lifetime, the gift may for such reasons be invalid.[16]

1 Colebrooke, Obligations and Contracts, sects. 66 to 81.

2 Hedaya, vol. iii. p. 292. Menu, book viii. sect. 199: "a gift or a sale thus made, by any other than the true owner, must by a settled rule be considered in judicial proceedings as not made." Vrihaspati, Digest, book ii. ch. iv. sect. 5, "the prohibition of giving away is declared to be eight-fold. A man shall not give joint property, nor his son, nor his wife, without their assent in extreme necessity, nor a pledge, nor all his wealth, if he have issue living, nor a deposit, nor a thing borrowed for use, nor what he has promised to another."

3 If a co-sharer make a gift of more than his share, the gift is valid to the extent of the giver's share. Princ. Mahomedan Law, p. 208. Princ. Hindu Law, vol. ii. p. 212.

4 Sacrificial fees are only fit to be received by the officiating priests to whom

Digitized by Google

they were offered: the purpose of the offerings, namely, the spiritual welfare of deceased ancestors, would be defeated by the alienation, see Nundaram *versus* Kashee Pande, S D. A. Rep. vol. iii. p. 232.

5 The same holds good with other female heirs under the Hindu Law, (Sect. 192) as well as for property assigned *as* a personal maintenance, see Kissenmohun Gossain *versus* Chutter Sing, S. D, A. Rep. vol. i p. 259.

6 Princ. Hindu Law, vol. ii. p. 258.

7 Mahoda *versus* Kuleanee, S. D. A. Rep. vol. i. p. 62. Bijya Deby *versus* Unnapoorna Deby, ibid, vol. i. p. 162. Ramdhun Shen *versus* Kissencanto Shen, ibid, vol. iii. p. 100. Princ. Hindu Law, vol. ii. p. 214, 224, 309.

8 Mohun Lal Khan *versus* Ranee Siroommunee. S. D. A. Rep. vol. ii. p. 92. Brindabun Chunder Roy *versus* Bishen Chunder Roy, ibid, vol. iv. p. 143.

9 Princ. Hindu Law, vol. ii. p. 238.

10 S. D. A. Rep. vol. i. p. 64, note 2. Roopchurn Mohapatree *versus* Anundlal Kha, ibid, vol. ii. p. 35.

11 Some Pundits however are of opinion that her acts, though illegal, are valid against her, see Consid. Hindu Law p. 16.

12 Princ. Hindu Law, vol. ii. p. 65. See also Consid. Hindu Law, p. 13.

13 Kulb Aly Hossein *versus* Syf Ali, S. D. A. Rep. vol. ii. p. 110. Princ. Hindu Law, vol. ii. p. 305.

14 Hedaya, vol. iv. p. 503. Princ. Hindu Law, vol. ii. p. 222, 226, 229. Colebrooke in Strange, vol. ii. p. 6.

15 Daya Bhaga, ch. ii. No. 23. Menu. "The support of persons who should be maintained, is the approved means of attaining heaven. But hell is the man's portion if they suffer. Therefore (let a master of a family) carefully maintain them." See also Catyayana, Digest, book ii. ch. iv. sect. 7. Dacksa, ibid, book ii. ch. iv. sect. 9. Vrihaspati. ibid, book ii. ch. iv. sect. 18. Strange, vol. i. p. 18.

16 Digest, book ii. ch. iv. sect. 15.

Future things. 271. Things, which are not yet in existence, but are future or expected to exist hereafter, may be the subject of a gift under the Hindu Law,[1] but not under the Mahomedan Law as seizin cannot take place.[2]

An heir can neither under the Mahomedan, nor under the Hindu Law, make gifts of, or from, an inheritance in expectance. Under the Mahomedan Law such gifts would be invalid both because seizin cannot take place, (Sect. 258,) and on account of uncertainty, (Sect. 274,) and under the Hindu Law, such gifts would be invalid as being contrary to the reason and intent for which the inheritance devolves upon the heir. (Sects. 150, 151.)

1 Catyayana, Digest, book ii. ch. iv. sect. 19, "except the whole estate, and his dwelling house, what remains after the food and clothing of his family, a man may give away, *whatever it be*, whether fixed or moveable."

Digitized by Google

2 Hedaya, vol. iii. p. 295. Princ. Mahomedan Law, p. 50. 204. A gift of what "he then possessed and might possess hereafter," is therefore invalid as to the last part. Musnud Ali *versus* Khoorshed Banoo, S. D. A. Rep. vol. i. p. 52. Ahmud Ollah *versus* Behar Ollah, ibid, vol. i. p. 284.

272. Things not in the possession of the donor, though belonging to him, may be the subject of gifts, under the Hindu Law; for instance, a thing mortgaged, lent out,[1] or sued for in the Court,[2] but not under the Mahomedan Law, as the donor cannot deliver the thing to the donee, not having actual possession thereof.[3] Things not in the donor's possession.

The gift of a mortgaged thing will not of course deprive the mortgagee of his rights, but only convey the rights of the donor to the donee, so that the donee may release the thing by paying the sum due.

Things incorporeal, as a right, a demand, an expectancy, except the expectancy of an inheritance, (Sect. 271) may be given away, provided the right is not a mere personal one. Under the Mahomedan Law, it is necessary that the right should be of such a nature that a delivery can take place. A bond, for instance, can be given away by the conveyance of it to the donee. Rights, demands, &c.

1. Digest, book ii. ch. iv. sect, 5 Princ. Hindu Law. vol. ii. p. 307. The prohibition of giving a pledge, a deposit, &c (Sect 270 note 2) refers not to the owner but to the person with whom the thing has been pledged, deposited, &c. who alone is prohibited from giving the thing, as if it was his property. The mortgagee can transfer his rights, but not more. See Digest, book ii. ch. 4. sect. 18, "a pledge must be disposed of by the law of pledges, or subject to redemption." Digest, book ii. ch. 4, sect. 28. The person with whom a thing is deposited cannot transfer the deposit to another, as a deposit is a personal trust.

2 Princ. Hindu Law, vol. ii. p. 231.

3 Princ. Mahomedan Law, p. 200.

273. Ancestral property may, equally with self-acquired property, be given away both under the Mahomedan, (Sect. 89,) and under the Hindu Law, except that a Hindu, who has any male descendant cannot assign a larger share of his immoveable ancestral property, according to the Bengal school, and of moveable as well as immoveable ancestral property, according to the Benares and Mithila schools, to one of his descendants, than to another, (Sect. 265) nor any part to others, except a small gift for a spiritual object. Ancestral property.

Princ. Hindu Law, vol. ii. p. 210, 252. What is to be considered as a *small*

Digitized by Google

gift, must depend upon the extent of the property. See Gopal Chund Pande *versus* Khunwar Sing S. D. A. Rep. vol. v. p. 24.

Joint and divisible property under Mahomedan Law.

274. Property held jointly with others may, according to natural law, be given away on the same conditions as property held separately, but as seizin is an absolute requisite to the validity of a gift under the Mahomedan Law, and as a complete seizin is impracticable with respect to an indefinite part of divisible things, and as, in case gifts without separation were lawful, it would be incumbent upon the giver to make a division, which he has not engaged for, not only gifts of joint property, but of a part of a divisible property, are invalid under the Mahomedan Law without a previous separation or division.

Hedaya, vol. iii. p. 293, 298

Joint property must be divided under Mahomedan Law.

275. A gift by one co-sharer of *his* share to a partner, or to a stranger, is thus invalid without previous division;[1] yet if a partner gives his whole share to his *sole* copartner, prior division is unnecessary, as no uncertainty exists in that case.[2]

Except.

By the doctrine of the Shia sect, a gift of immoveable, and not deliverable, property is valid without a division, as the Doctors of that school consider proprietary right in these cases to arise from abandonment by the donor, and not as with moveable and deliverable things from delivery and transfer.[3]

1 Hedaya, vol. iii. p. 294. Azeemoodin *versus* Fatima Bebee, S. D. A. Rep. vol. i. p. 24. Banoo Bebee *versus* Fokeeroodeen Hosen vol ii. p. 180.

2 Princ. Mahomedan, Law p. 212.

3 Mirza Kasim Ali *versus* Mirza Muhammad Hosen S. D. A. Rep vol. v. p. 213.

Divisible property must be divided under Mahomedan Law.

276. A gift made by the sole owner of parts of a *divisible* property, for instance, of a landed estate to several persons, without prior division, is invalid, even if the donor had empowered the donees to divide the property, and a division had taken place immediately after;[1] yet if the donees are poor, the gift will be valid without a division, being considered as an alms (a gift to God, who is one,)[2] and, upon the same principle, a gift of an unseparated part of a divisible property for the maintenance of the donee, is held to be valid.[3]

Except.

1 Khanum Jan *versus* Jan Bebee S. D. A. Rep. vol. iv. p. 210. Mir Nur Ali *versus* Majidah, ibid, vol. v. p. 136.

2 Hedaya, vol. iii. p. 299.

3 Princ. Mahomedan Law, p. 211.

Digitized by Google

277. *Indivisible* property, for instance, a house, cannot be given away to two or more persons *in distinct shares*, as a mixture of property would thereby be created. Such a gift as this: "I give a moiety of the house to A., and a moiety to B.," is therefore invalid; but if the conveyance is indiscriminate, as: "I give the house to A. and B." the gift is valid, and each takes a moiety according to Aboo Yoosuf and the Futwas, because in this case there is only *one* conveyance.

Gifts of shares of indivisible property is invalid.

Hedaya, vol. iii. p. 298 to 299, Mulvie Hyatee Khanum *versus* Mulvie Koolsoom Khanum, S. D. A. Rep. vol. i. p. 214.

278. Under the Hindu Law prior separation is not necessary to the validity of a gift of *divisible* property, as property may be transferred without seizin by a mere contract; and a gift of *indivisible* property to different persons is equally valid. Thus, if a man gives an estate, or a house, to three persons in equal or unequal shares without a previous division, the gift is valid, and in case the shares have not been stated, the donees take equal shares.

Divisible property need not to be divided under Híndu Law and gift of *indivisible* property in shares is legal.

Sheomauey Sing *versus* Ram Prakas Sing, S. D. A. Rep. vol. v. p. 145.

279. On the same principle, the rule would be the same with respect to gifts of *joint* property, so that not only may a partner in any trade, or other private transaction, give away his *share* of it to *whomever* he liked, without any prior division or any consent of his copartners, but *a member of a joint family* may also give away his share of the joint property in the same manner, if there was not a special prohibition,[1] for a particular cause, in the interpretation of which, the learned of the different schools disagree.

Nor joint property.

[1] Vrihaspaty, see Sect. 270, note 1.

280. According to the Bengal school, the prohibition of the gift of joint property, refers only *to joint family property*, and is made for the special reason,[1] that the family would be injured by a sale, or a gift, or other alienation effected by a distressed coheir as part owner of the joint property.[2] As this argues only a moral offence, the learned of this school consider a gift, or sale by a cosharer to the extent of his share, without a prior separation, to be legal and valid on the strength of the general rule that "a man

According to the Bengal School.

Digitized by Google

is master of his own wealth."[3] According therefore to the Bengal school a gift of joint property in general, without a prior separation, is valid, as it is not forbidden, and a gift of joint family property without a prior separation, is sinful, but legally valid.

1 Digest, book ii. ch. iv. sect. 5. Vrihaspaty, book ii. ch. iv. sect. 18.

2 Vyasa, Daya Bhaga, ch. ii. No. 28. Digest, ch. ii. ch. iv. sect. 5.

3 Nareda. "When there are many persons sprung from one man, who have duties apart, and are separate in business and character, if they be not accordant in affairs should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth." Daya Bhaga, ch. ii. sect. 31. Daya Crama Sangraha, ch xi. Digest. book ii. ch. iv. sect. 6 S. D. A. Rep. vol. i. p. 3. note; vol. iii. p. 22. Bhowanee Prusad Goh *versus* M. Taramonee, ibid, vol. iii, p. 138. Komlakanto Ghoussal *versus* Ram Hurry Nund Gramee, ibid, vol. iv. p. 196. Princ. Hindu Law, vol. ii. p. 212.

But according to the Benares and Mithila school gift of joint property is invalid without prior division.

281. According to the Benares and Mithila schools the prohibition is considered to be a *legal* interdict with reference to a text of Goutama,[1] which declares partition to be the *cause* of proprietory right *in joint property.* A gift, or a sale of joint property, whether family property, or other property held in common, is therefore held by the learned of these schools to be invalid without a prior division,[2] except when made with the assent of the rest of the cosharers, (when the gift becomes the act of all the cosharers,) *or*, these being minors, or unable to give their assent, when the alienation is made for the sake of the family, and especially for pious purposes.[3] When however a portion of an estate paying revenue to Government is sold; or given away, the alienation, though valid between the parties, will not affect the rights and claims of Government till a division of the estate has taken place, and the rent has been finally adjusted with the concurrence of the Board of Revenue, or the Governor General in Council. Until that event, the whole estate is liable to be sold for any arrear of the recorded proprietor, or his successors, as if the alienation had never taken place. Reg. 1, 1793, Sect. 10. Reg. 25, 1793, Sect. 28. Reg. 1, 1801, Sect. 12.[4]

1 Goutama, "an owner is by inheritance, purchase, *partition*, seizure or finding. Accptance is for a Brahmin an additional mode; conquest for a Cshatriya, gain for a Vaisya, or Soodra." Mitacshara on Inheritance, ch. i. sect. 1, No. 8

2 Vrihaspati: the passage, "separated kinsmen, as those who are unseparated, are equal in respect of immoveables; for one has not power over the whole,

Digitized by Google

to make a gift, sale or mortgage" is interpreted thus: that among unseparated kinsmen, the consent of all is indispensably requisite, because no one is fully empowered to make an alienation, since *the estate is in common.* Mitacshara on Inheritance, ch. i. sect. 1, No 30. Daya Bhaga, ch. ii. No. 31, note. Nundaram *versus* Kashee Pande, S. D. A. Rep. vol. iii. p. 232, vol. iv. p. 70.

3 Mitacshara on Inheritance, ch. i. sect. 1, Nos. 28, 29.

4 See Sham Raj *versus* Collector of Jessore, S. D. A. Rep, vol. i. p. 239.

5. *On pious Gifts.*

282. The determination of what are, and what are not, pious or charitable gifts, and their relative importance, depends of course on the tenets of the different religions, and should be determined accordingly.[1]

Pious and charitable gifts what?

The Mahomedan Law distinguishes between those gifts which are incumbent upon the donor as referring to the five primary duties, purification, prayer, alms, fasting and pilgrimage, and those, which are voluntary, as the erection of a mosque, of a retreat for travellers, or of a bridge and the like; the first being made for the performance of religious duties immediately enjoined by God, the others for benevolent purposes amongst mankind.[2] The giving of alms is especially enjoined on all true belivers, as an ordinance of God,[3] but in all other respects pious gifts are subject to the same rules as other gifts,[4] expect that alms-gifts cannot be retracted.[5] Gifts upon death-bed for charitable purposes have no preference over other gifts,[6] and are only valid, as far as they are within the one-third which a Musulman can legally bequeath.

According to Mahomedan Law.

No preference for other gifts.

1 Hedaya, vol. iv. p. 534.

2 Hedaya, vol. iv. p. 514.

3 Koran, ch. ix. (Sale, p. 145.) Hedaya, vol. i. p 1.

4 Hedaya, vol. ii. p. 335, vol. iii. p. 291, 310.

5 Hedaya, vol. iii. p. 310.

6 Hedaya, vol. iii. p. 109.

283. The Hindu Law distinguishes between pious gifts for a spiritual object, and for a worldly object. Among the first are reckoned, 1st. A present for performing indispensable rites in honour of ancestors. 2nd. A present to priests officiating at sacrifices and the like. 3rd. Pious and reverential gifts to Brahmins—as Brahmutra, Krishnarpana, Padargha—in satisfaction of a vow—as Vrithi or aliment—or from affection towards Vishnu and other

Gifts according to Hindu Law.

Digitized by Google

divinities.[1] Among pious gifts for a worldly object are considered: 1st. Gifts for education. 2nd Alms, especially of cows and lands to the learned, and the poor. 3rd. The digging of wells and tanks; the planting of trees for the use of travellers, and the poor, the making of roads, bridges, &c.[2]

No preference for other gifts.

Though the bestowing of both kind of gifts is recommended as the means of attaining future bliss,[3] they are prohibited, when their bestowal would deprive the family of the necessary support.[4] Gifts for a spiritual object are subject to the same rules as other gifts,

Except.

with some few exceptions : 1st, though a widow cannot make gifts from her late husband's estate (Sect. 166,) without the assent of the heirs, she can make gifts for spiritual purposes of a small portion,[5] without their assent ;[6] and 2ndly, though a father, who has male decendants, cannot, without their consent, make gifts of his immoveable ancestorial property, he may make a small gift[7] from it for spiritual purposes, without their assent. (Sect. 273.)

1 S. D. A. Rep. vol. v. sect. 28.

2 Yama, Parasara, Agni Purana, Nundy Purana.

3 Menu, book xi. sect. 6. " Let every man, according to his ability, give wealth to Brahmins, detached from the world, and *learned* in Scripture ; such a giver shall obtain heaven after this life."

4 Menu, book xi. sect. 9. " He who bestows gifts on strangers with a view to worldy fame, while he suffers his family to live in distress, though he has power to support them, touches his lips with honey, but swallows poison, such virtue is counterfeit" Ibid, book xi. sect. 10, " even what be does for the sake of his future spiritual body to the injury of those whom he is bound to maintain, shall bring him ultimate misery both in this life and in the next.

5 Whether the gift is to be called small or large must depend upon the wealth of the donor, see S. D. A. Rep. vol. v. p. 29.

6 S. D. A. Rep. vol. iv. p. 117 Princ. Hindu Law, vol. ii. p. 211, 244.

According to English Law.

284. Christians consider as pious or charitable all gifts for the relief of the poor and the sick, for education and for religious purposes.

There is no restriction whatever under the English Law upon persons giving way in their life time or bequeathing by their will, money or other personal property, but to prevent real property from being locked up by such an institution, and to protect the interest of the family from the conveyances of such gifts by persons in their dying moments no *real* property can be given for

Digitized by Google

charitable uses by a will, but only by deed executed twelve months before the death of the donor, and so as to take effect immediately and irrevocably. 9 Geo. ii. sect. 36.

6. *On the form of a Gift.*

285. The law does not prescribe any particular form for a gift. It may be made either verbally or in writing.[1] If in writing, the deed must be written upon stamp paper according to the value of the gift ; Reg. 10, 1829, A. 46, signed and witnessed, and the deed may be registered ; a registered gift has preference over a prior unregistered sale or gift. Reg. 36, 1793, Sect, 6, Cl. 1. Ben. Reg. 28, 1795, Sect 2. Ced. Conq. Prov. Reg. 17, 1803, Sect. 6. Cl. 1. Reg. 1, 1843. Form of a gift.

To distinguish a deed of gift from other agreements and contracts, the word "Hibbah" or "Dan" should be used, and to prevent any uncertainty, as to what as been given, the thing should be properly described and defined, and the name, situation and boundaries of landed property should be stated. Yet when the property is sufficiently known by its name and situation, and the boundaries are undisputed, the non-definition of the limits will not affect the validity of the deed ; and if the gift conveys all the property of the donor, a specification of it is unnecessary.[2] Any uncertainty in a gift must be interpreted against the donee, as the contract is gratuitous. If there be uncertainty in any essential part, the gift will be invalid under the Mahomedan Law.[3] Interpretation.

In gifts of landed property the assent of townsmen, of kindred, of neighbours and of heirs should be taken ; their assent (except the assent of heirs in some few cases, (see Sects. 270, 281,) is only required to facilitate the contract, and to prevent future disputes, and the want of it will not invalidate the contract.[4] Witnesses.

[1] Reg. 11, 1793, Sect. 6. S. D. A. Rep. vol. v. p. 87. Princ. Hindu Law, vol. ii. p. 230.

[2] Princ. Mahomedan Law, 209, 210.

[3] S. D. A. Rep, vol. i. p. 224.

[4] Mitacshara on Inheritance, ch. i. sect. 1 No. 30. Digest, book ii. ch. 4. Sec. 33.

Digitized by Google

7. *On the Effect of a Gift.*

Effect of gifts.

286. The effect of a gift is generally, that all the rights of the donor in the thing given are transferred to the donee, who stands to all intents and purposes in the same place as proprietor of the thing, as the donor would have done, if he had not transferred his rights.

Of unconditional gifts.

If the gift was unconditional, the donee becomes the proprietor of the thing from the moment the gift was accepted, and he, or his representative, may enforce delivery of the thing given from the donor, or, after his death, from his representative, (Sect. 261, notes); but under the Mahomedan, Law, the donee becomes the proprietor only from the moment the seizin took place. (Sect. 258.) Any disposal of the thing, given by the former owner after the acceptance of the promise under the Hindu Law, and after the seizin of the property under the Mahomedan Law, is illegal and invalid.

Of conditional gifts.

If the gift was conditional, the conditions are void under the Mahomedan Law; (Sect. 259,) but under the Hindu Law the donee is entitled to demand delivery of the thing after fulfilment of the conditions, (Sect. 261) and the donor is responsible for all deterioration caused by his neglect or fraud to the thing, until its delivery.

Of gifts to take effect after the death of the donor.

If the gift is to take effect after the death of the donor, it is invalid under the Mahomedan Law, (Sect. 260) but under the Hindu Law the gift is valid and irrevocable. If the donee should die before the donor, the gift becomes of course null and void, and does not devolve upon the heirs of the donee, when this has not been distinctly declared. Thus: a father makes a gift in favour of his four daughters to take effect after his death; one of the four daughters dies before the father; the heirs of the deceased daughter are not entitled to her share, there being no special provision in the gift to that effect.[2]

[1] Princ. Hindu Law, vol. ii. p. 208. Hedaya, vol. iii. p. 300.

[2] M. Abea *versus* Eshwur Chunder Gangoly, S. D. A. Rep. vol. ii. p. 290, confer p. 220. Princ. Hindu Law, vol. ii. p. 218.

Gifts are irrevocable.

287. A gift once legally made cannot be revoked without the consent of both parties, yet as presents to *strangers* are made in expectation of a return, either in things or services, a retraction

Digitized by Google

by the donor, but not by his heirs, of a gift to a stranger—though improper—is valid. Under the Mahomedan Law, however, this right is barried: 1st, when a return is given; 2nd, when the donee has alienated the thing, and improved or altered it, for instance, planted trees in the ground, built a house, &c.; 3rd, by the death of the donee, or the destruction of the thing given.[1]

under the Mahomedan Law.

Exception.

Gifts to kinsmen, to a husband, or to a wife during marriage, cannot be revoked under the Mahomedan Law, as their object was increase of affection; but gifts to a son may be revoked at any time, as the father has power over the property of his son.[2] Alms are irrevocable, as their object is merit in the sight of God.[3]

Gifts to sons are revocable.

Under the Hindu Law, gifts are always irrevocable,[4] with the only exception that a father may in case of necessity resume gifts made to his son.[5]

under the Hindu Law.

Exception.

[1] Hedaya, vol. iii. p. 300. Shah Makdum Ruksh *versus* Lufty Aly, S. D. A. Rep. vol. v. p. 355. Princ. Mahomedan Law, p. 224.

[2] Hedaya, vol. iii. p. 300.

[3] Hedaya, vol. iii. p. 301.

[4] Menu, book ix. p. 47. " Once is a partition of an inheritance made, once is a damsel given in marriage, and once does a man say, " I give ;" these three are by a good men, done once for all *and irrevocably*." Princ. Hindu Law. vol. ii. p. 250.

[5] Harita. " A father during his life distributing his property, may retire to the forest, or enter into the order suitable to an aged man, or he may remain at home, having distributed small allotments and keeping a greater portion, should he become indigent, he may take back from them." Daya Bhaga, ch. ii. No. 57. Digest, book v. sect. 23. Princ. Hindu Law, vol. i. p. 55. vol. ii. p. 148.

288. A will on the contrary is revocable; all disposals therefore made by the testator during his life time contrary to the will are valid, the testator having in so far by his own acts altered or modified his testamentary dispositions.

But disposals during life time contrary to " a will," are valid.

289. When by a deed of gift several things are transferred, and the gift of some is valid, of some, invalid, the whole gift is not invalidated by the invalid part; but the valid part will remain valid and have legal effect.[1] Thus, if a man makes a gift of a property mortgaged to another, without mentioning this circumstance to the donee, the donee will be entitled to obtain the mortgaged property on paying off the mortgage.

Gifts only partly valid have legal effect so far.

Digitized by Google

The Mahomedan Law goes still further, so that a gift, which would have been *wholly* invalid, if a particular fact had been known at the time of the gift, remains partly valid, if such fact first became known afterwards.[2] For instance, when a gift is made of landed property, and another person is afterwards found entitled to a share, the gift is valid to the extent of that part to which the donor is found entitled.[3] If it had been known at the time of the gift that the donor was only entitled to a share, the gift would have been invalid, on account of indefiniteness, no division having taken place prior to the gift; (see Sect. 276,) but as this fact first became known afterwards, the donee retains the share belonging to the donor.

1 Princ. Mahomedan Law, p. 201. Princ. Hindu Law, vol. ii. p. 212.

2 Princ. Mahomedan Law. p. 208.

3 M. Hyatee Khanum *versus* M. Koolsoom Khanum, S. D. A. Rep. vol. i. p. 214, see also p. 115.

Donor not bound to warranty.

290. As a gift is a gratuitous contract, the donor is not bound to warranty.[1] Thus if a man makes a present to another of a gold watch, and the watch is found to have been stolen, and is recovered by the real owner, the donee cannot sue the donor for damages; or, if for instance, a gift is made of a horse, and the horse is found to have some internal defect, the donee is not liable to pay damages for this defect; but in case the gift was made with the previous knowledge of any of these facts with the intention of causing some injury to the donee, the donor will of course be liable to damages, not as a compensation for the gift, but as a compensation for the injury caused by a voluntary and intentional act.

1 Hedaya, vol. iii. p. 306.

Donee not accountable for means profits.

291. The donee is neither accountable for the profits accruing during his possession, nor for deterioration, but he is entitled to restitution for augmentations, in case the gift, as invalid, be set aside, because he had possession under a title, believed by him to be good.[1] Should he be a party to a fraud, and hold possession with bad faith, he will of course be accountable for profits, &c.

1 Hedaya, vol. ii. p. 460. Banoo Bebee *versus* Fuckeroodin Husin, S. D. A. Rep. vol. ii. p. 180. Princ. Mahomedan Law, p. 239. Princ. Hindu Law, vol. ii. p. 208.

Digitized by Google

BOOK IV.

ON WILLS.

1. *On wills and codicils in general.*

292. A will is the declaration of a man's intentions, which he wills to be performed after his death, revocable until such event. What a will is.

A will is also called "a testament," but there is a distinction between a will and a testament; it is called a will, when an executor is appointed; when there is none, it is termed a testament.[1] What a testament is.

A codicil is a supplement to a will annexed to it by the testator, and to be taken as part of the same, either for the purpose of explaining or altering, or of adding to, or subtracting from his former dispositions. What a Codicil is.

[1] Wentworth, Off. exec. p. 2.

293. A will is generally defined to be the "*legal declaration* of a man's intentions," because if it be not made and attested with the forms and solemnities required by the law, it is not considered as the will of the party by whom it purports to be made, but is wholly null and void. This holds good only with respect to wills under the English Law. Neither the Mahomedan Law nor the Hindu Law prescribes any form or solemnity for making or attesting a will; it is sufficient that it can be proved to have been really and truly the will of the testator. A will is termed a *legal* declaration.

2. *Who can make a will.*

A. *Under the Mahomedan Law.*

294. According to the Mahomedan Law, an owner has a perfect right to dispose of his property during his life time, but this right ceases on his death, and his property devolves upon his heirs. Who can make a will under the Mahomedan Law.

Digitized by Google

He can make gifts to the full extent of his property during his life time, but the acceptance must be immediate, and he is not allowed to postpone its effect, (Sect. 259.) The right of making gifts ceases even before his death, as a gift made upon his death-bed beyoud a third of the clear residue of his estate, after the payment of funeral expenses and debts, is invalid, without the sanction and consent of his heirs *after* his decease.[1] According to this principle a bequest of property, which is first to take effect on the decease of the proprietor, would be invalid, as the right of the proprietor over his property has at that time ceased, yet the Law permits it for a special reason, viz : " to enable the proprietor to make up for former deficiencies by means of his property,"[2] but restricts it to one-third of the clear residue, after the payment, of funeral expenses and debts.[3]

Under these restrictions every person who is able to contract, is also able to make a will. The husband's consent to the will of his wife, is not required, as she is perfect owner of her own property. A will made during minority is invalid, even if the testator should die after attaining his majority.[4]

1 Hedaya, vol. iii. p. 162; vol. iv. p. 503.

2 Hedaya, vol. iv. p. 469.

3 Hedaya, vol. iv. p. 469; S. D. A. Rep. vol. i. p. 150.

4 Hedaya, vol. i. p. 467. vol. iv. p. 476, 477.

B. Under the Hindu Law.

Who can make a will under the Hindu Law.

295. According to the Hindu Law, the owner has also generally a perfect right to dispose of his entire property during his life-time, self-acquired as well as inherited, (Sect. 270,) except of his real ancestral property, which he cannot alienate by way of gift, if he has any male descendant. (Sect. 273.) As immediate acceptance of a gift is not required, the owner may make it conditional or postpone its effect until after his death, (Sect. 261,). but once made, the gift is irrevocable (Sect. 287). Bequests, which are to take effect only after the death of the donor and are *revocable* until that time, are perfectly unknown to the Hindu Law, but they are admitted by practice, and on the strength of Reg. 5, 1799, Sect. 2, a Hindu is considered entitled to dispose of his property

Digitized by Google

by will to the same extent, as he is entitled by the Hindu Law, to dispose of it by gifts and on partition.[1]

Under these restrictions, every person who is able to contract, is also able to make a will.

[1] Reg. 11, 1793, Sect. 2. Ben. Reg. 44. 1795. sect. 6. Reg. 10, 1800, sect. 2. Eshanchunder Raj. *versus* Eshwurchunder Raj. S. D. A. Rep. vol. i. p. 2. Janki Deby *versus* Sudda Sheo Raj, ibid, vol. i. p. 197. Srenarain Raj. *versus* Bhya Jah, ibid. vol. ii. p. 23. Princ. Hindu Law vol. i. p. 3. Colebrooke in Consid. Hindu Law, p. 317, and in Strange, vol. ii. p. 432. consult. vol. i. p. 254. Under the Mahomedan Government, the will of a Hindu was only valid to the same extent as the will of a Mahomedan, see Hedaya, vol. iv. p. 538.

C. Under the English Law.

Who can make a will under the English Law.

296. According to stature 1 Vict. ch. 26, re-enacted for this country by Act 25 of 1838, every person of age (viz., not under the age of twenty-one) who is not specially incapable by law or custom, has full power to make a will, sect. 4, 5.

The grounds upon which persons are incapable of making wills are:

1. *Want of legal discretion;* as in the case of minors, idiots, madmen, lunatics, persons grown childish by old age or distemper, or whose intellects are destroyed by drunkenness.

Married women

2. *Want of liberty and free will;* as in the case of married women, prisoners, captives and the like.

A will by a married woman is invalid, except.

a. A will of the *personal estate* with the consent of her husband.

b. A will of *personal property,* which the husband has stipulated shall be enjoyed by the wife separately, and of savings out of such separate property.

c. A will of *personal property* giving *in trust* for the sole and separate use of a married woman.

d. A power of appointment by will under a power to be exercised notwithstanding her marriage.

e. A will of effects to which she is entitled, not on her own right, but as executrix of a will.

f. A will made by a married woman, whose husband has been

Digitized by Google

banished for life by Act of Parliament, or who has abjured the realm.

Prisoners, &c., are not absolutely incapable of making wills; it is left to the discretion of the Court to determine, upon a consideration of the circumstances, whether they have sufficient free will at the time of making the will.

3. *Criminal conduct;* as in the case of traitors and felons, without benefit of clergy from the time of their conviction: outlaws and self-murderers, so far as relates to their goods and chattels.[1]

[1] Act 25 of 1838, Sect. 6. 34 & 35 Henry viii. 1 Vict. 26. 2 Blackstone's Com. p. 497, 498. Toller, p. 10. Lovelass, p. 144. Eagle on Wills, p. 5.

3. *In what manner a Will is to be made and attested.*

A. *Under the Mahomedan and Hindu Law.*

How a will is to be made and attested under the Mahomedan and Hindu Law.

297. A will may be made either verbally—a nuncupative will—or in writing; when satisfactorily proved, both have the same effect.[1]

[1] Hedaya, vol. i. p. 463. Princ. Mahomedan Law, p. 53. Princ. Hindu Law, vol. ii. p. 147, note.

A verbal will how far effectual.

298. Though a verbal will is as valid as a written one, yet it follows from the nature of a will as a *revocable* declaration, that if the testator does not die so soon after the declaration, that it would be unreasonable to suppose him to have altered his intentions, the verbal will is wholly without effect, because the testator may afterwards have altered his intentions.

The disposition must be made by words spoken with an intent to bequeath and not in a loose discourse, and the testator must require the by-standers to be witnesses to his intentions. If the witnesses should depose to the fact a long time after the death of the testator, their evidence may be objected to, as the exact words may have escaped their memory.

Form of a written will.

299. A written will may be written upon unstamp paper (Reg. 10, 1829, A. 46,) and should either be written by the testator himself, or at least be signed or acknowledged by him, in the presence of two credible and uninterested witnesses called in for the purpose.

It is not absolutely necessary that the witnesses should be made

Digitized by Google

acquainted with the contents of the will, as the witnesses are only required to prove that the document contains "the will" of the deceased, and not to prove its contents, which can be known from the document; but as this is somewhat unusual, it is proper in such cases, that the witness should, on signing the will, add that the contents are unknown to him.

B. Under the English Law.

300. A will whether it relates to the real or to the personal estate, to be valid must, 1, be in writing; 2, be signed at the foot or end of it by the testator, or by some other person *in* his presence and *by* his direction; 3, the signature must be made or acknowledged by the testator *in* the presence of two or more witnesses *present* at the same time; and 4, such witnesses, must subscribe the will *in* the presence of the testator. Act 25, of 1838, Sect. 7. No form of attestation (no seal, for instance,) or publication, is required to the validity of the will; ibid 7, 9.

A will under the English Law must be in writing, &c.

301. The witnesses—male or female—who are employed to attest a will should be credible and competent, in order that the will may be satisfactorily proved to contain the legal declaration of the testator. Yet, if one of the attesting persons should at the time of the execution, or afterwards, be incompetent to be admitted as a witness to prove the execution of the will, it will not on that account be invalid, if it can be proved by the other witnesses. Act. 25, 1838, Sect. 10.

If one of the witnesses be incompetent, this does not invalidate the will.

302. A creditor or an executor may be a witness to prove the will, and so may a legatee, or the wife, or the husband of a legatee; but if a legatee, or the wife, or the husband of a legatee, attests the execution of the will, the legacy becomes null and void, Act 25, 1838, Sects. 11 to 13.

A Creditor, Executor and Legatee may be a witness.

but the legacy becomes void.

303. One or more executors should be appointed, by the will; (Sect. 56) if none has been appointed, or the executor is incapable of acting, or refuses to act, the Court must appoint an administrator, to executor the will of the deceased.

Executors must be appointed.

304. All verbal wills are invalid, Act 25, 1838, Sects. 7, except made by soldiers in actual military service,[1] or by a mariner or seaman at sea relative to their personal property; ibid, Sect. 29.

All verbal wills are invalid

Exceptions.

Digitized by Google

Their wills relating to their wages, pay, &c., must be in writing and attested; see 11, Geo. IV.; 1 Wm. IV. ch. 20. (Sect. 298).

1 That is to say during actual war, when the proper forms cannot well be attended to, not in time of peace or in cantonments.

Gifts in the prospect of death.

305. A gift of personal property made in the prospect of death in the last illness of the donor, is a kind of nuncupative legacy. In case the giver should recover, the property must be restored, as it was only given in contemplation of is death; but if he dies, the goods become the property of the person to whom they were delivered, without the assent of the executor, even if it should happen to be a gift contrary to the will of the donor; such gifts are however invalid against creditors.

It is essential to the validity of gifts of this description, that they should be accompanied with delivery. If actual delivery can be made, the thing itself should be delivered, but things in a go-down, or in a trunk, are considered as delivered by the delivery of the key. The delivery of a bond to a debtor, is a release from the debt, but the delivery of a bond, not payable to the bearer, to any other person, than the debtor, is not a gift without a formal transfer.

2 Blackstone's Com. p. 514. Lovelass, p. 161. Toller. p. 233.

Codicils how to be made.

306. A codicil (Sect. 292,) is to be executed in the same manner as a will (Sects. 297 to 302.) It may be written on the same paper as the will, or on a different paper, and it is then usually annexed to the will, though this is not necessary.

Although a testator cannot make more than one will, properly so called, he is at liberty to make any number of codicils he may think proper: these should always commence with a reference to the will, or to the will and the former codicil.

4. *How a Will may be anulled, revoked or altered.*

How a will may be anulled, revoked or altered.

307. A will is in its very nature a revocable instrument. Even if the testator should in the most solemn manner have declared that is will was to be irrevocable and unalterable, still he is at liberty to revoke or alter it.

1 (Mahomedan Law,) Hedaya vol. iv. p. 473. (English Law,) 8 Co. 82. Toller, p. 14. A will for a consideration entitles only the person who gave the consideration, to recover it when the will is altered, but does not make the will.

Digitized by Google

unalterable. Avictick Ter Stephanos *versus* Khaya Michall Arratoon, S. D. A. Rep. vol. iii. p. 9.

308. The revocation of a will, or of a bequest, may either be express or implied.[1] *Express*, by executing another will, or codicil, or some writing, declaring the revocation thereof, or by destroying the will, or causing it to be destroyed *with* the intention of revoking it. Act 25, 1838, Sect. 16. *Implied*, by any act of the testator arguing his retraction.

The revocation of a will may be express, or implied.

Under the Mahomedan Law it is considered an implied revocation, when the testator creates an addition to a legacy in such a manner, that the legacy cannot be separately delivered, as by building as house on a piece of ground ; or when he causes an extinction of the proprietary right of the testator ; for instance, by selling it, making a gift of it, &c., when, in case the testator repurchases the thing, or retracts the gift, the thing will not go to the legatee.

Implied under the Mahomedan Law.

Under the English Law it is considered an implied revocation only when the testator or testatrix enters into a new marriage, and not even then, if the will was made in the exercise of a power of appointment of property, which, in default of such power, would *not* pass to his or her heirs. Act 25, 1838, Sect. 14. An extinction of the proprietary right of the testator subsequently to the execution of the will, is not considered as a revocation of the bequest, if the property belonged to the testator at the time of his death. Ibid, Sect. 19. Nor is an alteration in the testator's circumstances considered as presumptive of an intention to revoke the will Ibid, Sect. 15. Obliteration, interlineation, or other alteration in the will has no effect, except so far as the words or effect of the will before such alteration is not apparent. Ibid. Sect. 18. To make an alteration effective, it is necessary that the testator, as well as the witnesses, should subscribe to the alteration, either in the margin, or at the foot, or near the alteration, Ibid, Sect. 17.

Implied under the English Law.

When a will or bequest has once been revoked, it can only be revived by a re-execution, or a codicil to that effect. Ibid, Sect. 18.

To revive a revoked will, it must be re-executed.

[1] Hedaya, vol. iv. p. 479. Princ. Mahomedan Law, p. 54.

Digitized by Google

5. *On the effect and interpretation of a Will.*

A. *Under the Mahomedan Law.*

Wills under the Mahomedan Law take effect on the death of the testator and must be construed accordingly.
The valid part takes effect.

309. As a will does not take effect till the death of the testator, all its dispositions must be construed as if the will had been executed immediately before the death of the testator; the intention of the testator must be followed, as far as it is in conformity with law, or at least is not contrary to law; and if one part should be invalid or illegal, the whole will not be effected; but that part which is legal is to be carried into execution.

[1] Hedaya, vol. iv. p. 475, 495. Princ. Mahomedan Law, p. 54, 243.

Bequests can only be made in favour of strangers.

310. The right of each heir, under the Mahomedan Law, to a certain share of the estate is unalterable, on account of this saying of the Prophet: "Verily God has bestowed on each his own peculiar right." No bequest therefore in favour of a person, who at the time of the death of the testator is one of his heirs, is valid, without the assent of the other heirs *after* the death of the testator. Bequests can only be made in favor of a stranger (that is, of one who is not an heir) and of one-third of the clear surplus of the estate, after the payment of funeral expenses and debts.

Hedaya, vol. iii. p. 165; vol. iv. p. 470 to 472. Hidayát Ali Khan *versus* Tajun and others, S. D. A. Rep. vol. v. p. 287. Princ. Mahomedan Law, p. 53, 248.

Are not to exceed one-third of the surplus of estate, after payment of debts and funeral expenses.

311. If the testator bequeathes more than the one-third, either at once, or at different times, and the heirs refuse their consent, all the legacies being equally good, each legatee must suffer a proportional deduction.[1] Thus, if one-third of the property is bequeathed to one person, and one-sixth to another, the legal third will be divided into three parts, of which the first will receive two, and the other one. Or, if a piece of ground valued at 2000 Rupees was bequeathed to one, and a shawl valued at 200 Rupees to another, and the legal third amounted only to 1100 Rupees; the first would be entitled to the ground on paying to the estate the difference in value, 1000 Rupees, and the second would receive the shawl on paying 100 Rupees; or, if they did not choose to receive the things on this condition, the heirs might take them on paying to the legatees their proportional share, viz., to the first

Case.

Digitized by Google

1000 Rupees; and to the second 100 Rupees; or, the things must be sold, that the legatees, as well as the heirs, may obtain their rights.

If he has no heir, he may bequeath the whole.

The restriction to one-third is only given with reference to the legal rights of the heirs. (Sect. 310.) If therefore the testator has no heir, he may bequeath his whole property. (Sect. 94.)

1 Hedaya, vol. iv. p. 482.

Future, joint, and divisible things, may be bequeathed.

312. Within the one-third, the testator may not only bequeath things actually in his possession, but also things not in his possession, and even not belonging to him, in which case it is the duty of the executor to obtain the thing, if he can, and deliver it to the legatee, as far as it comes within the disposable part of the estate; or to pay its value. The testator may also bequeath a thing held in partnership with others, or he may give one thing to several individuals, without separating or defining the portion of each.

When the testator bequeaths a thing not in his possession, he must of course state, that the thing is to be acquired and given, otherwise the bequest is null. Thus, if he bequeaths a horse to a person, and there is no horse in his estate on his death, the legatee receives nothing; but if he says, that out of my property a horse is to be given to B., then a horse must be bought and given, or its value paid to the legatee.[2]

1 Hedaya, vol. iv. p. 492. Princ. Mahomedan Law, p. 54.

2 Hedaya, vol. iv p. 491, 527. Princ. Mahomedan Law, p. 242, note 246.

Gratuitous contracts *on death-bed* are viewed as bequests.

313. To pervent the testator from disposing of more than the legal one-third by making the bequest under another form, all contracts, as gifts, a sale for an under value, a purchase for an over-value, an acknowledgment of debt, of dower, contract of hire, security, &c., made by him *on his death-bed*, are considered in the light of bequests, and take effect only to the extent of the one-third.[1] And an acknowledgment of debt in favour of an heir takes effect only with the consent of the other heirs. (Sect. 310.)[2]

The legally contracted dower and debts must of course be paid to the extent of the whole property, but if there is no other proof than the acknowledgment of the deceased, and the heirs object, the acknowledgment will only give validity to the extent of the legal one-third.[3]

Digitized by Google

1 Hedaya, vol. iv. p. 503, 507.

2 Hedaya, vol. iv. p. 504.

3 Hedaya, vol. iv. p. 494.

A will must be interpreted by the same rules as a contract.

314. When the words, or sentences in a will are ambiguous, they should be interpreted and construed in the same manner as in a contract, so as to give effect to the real intention of the testator, as far as it is in conformity with law.[1] For instance, in a bequest thus: "I bequeath to A. *and* B. my house," if A. dies before the testator, B. will take the whole house, because as the bequest was made indiscriminately, it must have been the intention of the testator, that these two persons should, in whatever manner, enjoy the whole; but if the bequest was made thus; "I give to A. and B. may house to enjoy the same in equal shares," then it must have been the intention of the testator, that each should enjoy a moiety, and if A. dies before the testator, his moiety lapses to the estate.[2]

1 Colebrooke, Contracts and Obligations, sect. 140 seq. Hedaya, vol. iv. p. 528 seq.

2 Hedaya, vol. iv. p. 491. Princ. Mahomedan Law, p. 54.

Unaccepted bequests are not hereditable.

315. A bequest to a person without any clause that the bequest shall go to his heirs, in case he should die before the testator, becomes void, when that event happens, because the legacy has not yet become the property of the legatee, and the testator has not willed that it should go to his heirs;[1] but if the legatee survives the testator, for however short a period, the legacy will go to the estate of the legatee, though he had not expressly accepted it before his death; as his acceptance is implied from his not having rejected it.[2]

1 Hedaya, vol. iv. p. 491, 524, 528.

2 Hedaya, vol. iv. p. 475.

Pious bequests have no preference.

316. Bequests for pious purposes (Sect. 282,) have no preference over other bequests; altogether they are not to exceed the one-third; if they do, all of them must suffer a proportional deduction. (Sects. 310, 311.)

If the bequests are made for the performance of several religious *duties*, those made for the performance of duties absolutely incumbent, are first executed, whether the testator has mentioned them first or not, but with regard to those of which the object is

Digitized by Google

not incumbent, the arrangement of the testator is followed, and every distinct duty is considered as a different legacy, as each has its own object.

Hedaya, vol. iv. p. 514 seq.

B. Under the Hindu Law.

317. Strictly speaking, the will of a Hindu should take effect and be interpreted according to the rules of the Mahomedan Law, because it was only to that extent (viz-, to the one-third of the surplus of the estate) and under those rules, that a will was legal and valid during the Mogul Government,[1] but with a total disregard to the law which existed for centuries, the Hindu Law has been referred to since the Company obtained possession of the country, and though a will is unknown to that Law, yet a Hindu has been declared entitled to dispose of his property to the same extent by will, as he is entitled by that law to dispose of it on partition and by gifts, (Sect. 295.) As to the form, the effect, and the interpretation of a will, nothing is of course to be found in the Hindu Law, and the rules of the Mahomedan Law, (Sects. 309 to 316,) must therefore be followed, as a matter of necessity, even if they were not, as they invariably are, in conformity with natural justice. The English Law is of no force in this country, except for "British subjects." (See Sect. 11.)

On the effect and interpretation of a will under the Hindu Law.

1 Hedaya, vol. iv. p. 538.

C. Under the English Law.

318. As a will first takes effect on the death of the testator, all dispositions must be construed as if the will had been executed immediately before the death of the testator, unless a contrary intention appears by the will, Act 25, 1838, Sect. 20. Property therefore, acquired by the testator *after* the will was executed, is included in the disposition, and will, as such, generally go to the residuary legatee, if any, or to the heirs. The intention of the testator is to be followed, as far as it is not contrary to law, and if one part is invalid, or illegal, the other parts will not be affected, but carried into execution. The invalid part becoming void will lapse to the estate, and be taken by the residuary devisee. Ibid, Sect. 21. Thus, if A. bequeathes to B. his cloths

A will under English Law construed as executed immediately before testator's death.

Invalid part is void, valid part takes effect.

Void legacies lapse to the residuing legatee.

Digitized by Google

and house furniture ; to C. 1000 Rupees ; and to D. the remainder of his property ; and if B. dies before the testator, the cloths and house furniture bequeathed to B. will lapse to the estate, and as part of "the remainder" be taken by D., the residuary devisee.

The whole real and personal estate, may be bequeathed.

319. Every competent person (Sect. 296,) is entitled to bequeath by will all the real and personal estate, to which he may be entitled at the time of his death, and which, if not so bequeatbed, would go to his heir, or executor, or administrator, Act 25, 1838, Sect. 4. He has the unlimited disposal of his property, self-acquired as well as inherited, real as well as personal. He may bequeath it to one person, or to more ; to his wife, in exclusion of his children ; or to a stranger, in exclusion of both ; to his illegitimate childreen, in exclusion of his legitimate ; to one son, in exclusion of all the other children ; to daughters, in exclusion of sons ; to strangers, or for charitable uses, in exclusion of wife and children ; his own pleasure is the only law he is to follow.

And by different legacies.

320. A person may dispose by will either of his whole estate or only of a part of it, leaving the remainder to go to his legal heirs. In disposing by will of his whole estate, the testator may either exhaust the estate by discriminate legacies (specific and general), or only dispose of some part by the same kind of legacies, leaving the remainder, whatever it may be, to one or more persons in aliquot parts. Legacies are thus of three kinds : specific, general, and residuary.

Specific legacy.

321. It is a specific legacy when a certain thing is to be given ; for instance : I give to A *the* diamond ring, or *my* riding horse, &c., or I give to A. *a* diamond ring, or *a* riding horse. In the first case, the identical thing must be delivered to the legatee ; in the last, a thing of the same kind. Both must be satisfied, before any general legatee, immediately after the creditors. In case the creditors cannot be satisfied, the legacies become of course void,[1] and if only a part of the bequeathed things is left after payment of the debts, all the specific legatees must suffer a proportional deduction, (consult Sect. 311.)[2]

1 2 Blackstone's Com. p. 511. Tollar, p. 258, 300, 339. Lovelass, p. 51, 204.

2 Toller, p. 340.

Digitized by Google

322. It is a general legacy when a certain quantity of money is to be given from the estate, for instance, a legacy of 5000 Rupees, an annuity, &c. A general legatee is to be paid after a specific, but before the residuary legatee; if all the general legatees cannot be satisfied, they must suffer a proportional deduction. General legacy.

1 2 Blackstone's Com. p. 512. Toller, p. 302. Lovelass, p. 205.

323. Is is a residuary legacy when "the remainder," "the residue," is to be given. For instance; "with the exception of the above legacies, I give and bequeath to my wife,—or to my two sons in equal shares,—or to C.—all my other property, real and personal."[1] Here the wife, or the sons, or C., is called the residuary legatee, and is entitled not only to what remains after the payment of debts, and of specific and general legacies, but also to such general and specific legacies, as may become void, on account of the death of the legatee in the life time of the testator. Act 25, 1838, Sect. 21. Residuary legacy. Lapsed legacies go to the residuary legatee not to the legal heirs.

1 In England an Executor has only charge of the *personal* estate, (Sect. 224), but in India of the *real* estate also; both are equally deemed assets in the hand of the Executor, or Administrator. 9 Geo. IV. ch. 33.

324. In case the testator has appointed no residuary legatee, any residue with may be left after the payment of the funeral expenses, charges, debts, and legacies, will go to the executors, appointed by the will, if it does not appear from the will, that the testator meant to confer upon them merely the office, and not the beneficial interest, in which case it will go to the legal heirs. If there be no residuary legatee, the residue lapses to the executor. Exception.

Toller, p. 351. 2 Blackstone's Com. p. 514.

325. When the words or sentences in a will are ambiguous, they should be interpreted and construed in the same manner as in a contract, so as to give effect to the real intention of the testator, as far as it is in conformity with law. Act 25, 1838, Sect. 20. (Sect. 318.) Therefore: Interpretation of a will.

1. When a legacy is left to a certain person, without any clause,[1] that the bequest shall go to his heirs, in case he should happen to die before the testator, the legacy becomes void, if the legatee dies before the testator, Act 25, 1838, Sect. 21. Except: Legacies are not generally hereditable.

a. When an estate is bequeathed for an estate tail, or quasi entail, that is to say, when an estate is bequeathed to a man and

the heirs of his body, or of him and his wife, or of the male heirs of his body, &c., should the legatee die *before* the testator, his heir will take the estate. Ibid, Sect. 27.

b. When the legatee is a child, or other issue of the testator, then also will the heir of the legatee take the legacy, unless a contrary intention shall appear by the will. Ibid, Sect. 28.

2. When in a will the expression is used "dies without issue," or "die without leaving issue," it must be construed so as to mean, die without leaving issue at the time of the decease of the legatee, ibid, Sect. 24. Therefore, if the party—the testator or the legatee—after the execution of the will should have children, and these children should die before the testator, the will is not invalidated by the brith of these children, because the will is first to take effect on the death of the testator, and is to be interpreted as if it had been executed immediately before his death. (Sect. 318.)

3. When a real estate is bequeathed without limitation, it must be understood to mean a bequest of the whole interest of the testator, ibid, Sects. 23, 25, 26, and thus to include commons, ways, rents of land, &c., without any special clause for that purpose ; and on the death of the legatee, he having survived the testator, the estate will devolve on the heirs of the legatee.

The phrase " to him, his heirs, executors, administrators, or assigns" is therefore not requisite to transfer the property to the legatee and his heirs ; on the contrary, the property will go to the heirs after the death of the legatee, if it be not distinctly stated that only a life interest is bequeathed.

Digitized by Google

BOOK V.

ON SALES.

1. *On the requisites to a Sale.*

326. A sale is a transfer of property for a certain price. A transfer of goods for goods is called barter or exchange. A sale is a transfer for a consideration.

To establish a sale it is necessary that a consideration should be given in exchange for the thing, otherwise it is a gift. If full consideration is not given, it is in its nature partly a gift, partly a sale, but as it is not necessary to the validity of a sale that the value of the thing should be equal to the price given, any consideration, however inadequate, will generally make the contract to all effects a sale. Whether a contract is a gift or a sale depends therefore upon the consideration, not upon the name by which the contract is called. A Hiba bil-Jwuz is a sale, and a Dañ-Putro by which a thing was given for a consideration, would be a sale, and ought to be treated as such. (Sect. 256.)

327. A sale like other contracts, is rendered valid, by tender and acceptance, and may either be effected so that the delivery of the thing and the payment of the price shall take place immediately and unconditionally, or, that the one, or the other, or both, shall be postponed until a future time, or, be dependant upon certain conditions. A sale is rendered valid by tender and acceptance.

328. The consent of the parties may either be given in express words, or by implication, for instance, by the delivery of the thing and the acceptance of the price. As the contract involves an offer from the one party, and its acceptance or refusal by the other, a reasonable time must be allowed to the other party to accept or refuse. Consent either express or implied.

If no time has been agreed to for that purpose, the acceptance must take place before the other party leaves the meeting, other- Tender when to be accepted.

Digitized by Google

wise the offer becomes void, and, if the offer was made by letter or message, it must be accepted by the first post-day, or before leaving the place where the message was received.[1]

When time has been given for consideration, but without specifying its extent, it is understood to be three days,[2] as being the longest term generally necessary for consideration. This condition is often expressed by implication, as when the purchaser promises to pay the price agreed on without any stipulation as to time, and then to receive the thing; in this case, if the money be not paid within three days, either because the purchaser cannot or will not, the sale becomes null, and the seller may sell to another.[3]

When a specific time for consideration has been agreed to, the parties are respectively bound by their engagement till the expiration of the term, whatever may have been its length. The seller cannot within that period sell the thing to another; and the purchaser is obliged to pay the price offered, if the seller agrees to accept it.[4]

1 Hedaya, vol. ii. p. 362.
2 Hedaya, vol. ii. p. 381.
3 Hedaya, vol. ii. p. 382.
4 According to the opinion of Aboo Hunefah and Aboo Yoosuf. Hedaya, vol. ii. p. 382, it is not lawful to stipulate for more than three days, but according to Mohammud, it is lawful, and this opinion is prevalent in this country, see S. D. A. Rep. vol. i. p. 57, note.

Parties cannot retract.

329. As soon as the parties are agreed, whether the agreement has been reduced to writing or not, it is binding on them and cannot be revoked,[1] unless in case of a defect in the goods, (Sect. 400) or their not having been inspected.[2] The instant delivery of the goods is not essential to the validity of the contract, but inspection is necessary, as a consent without that is nugatory.[3]

Exception.

Right of inspection.

The option of inspection continues in force to any extent of time after the contract,[4] unless it is expressly or implicitly waived, as by selling, mortgaging, or in any other way disposing of the thing.[5] The acceptance by any agent, is equivalent to the inspection by the purchaser,[6] and the inspection of a part, or a sample, is equivalent to the inspection of the whole, provided the goods correspond with the sample.[7]

1 Hedaya, vol. ii. p. 361, 380. According to some texts of the Hindu Law,

Digitized by Google

the purchaser is at liberty to retract within a certain time; see Yajnyawalcya, Digest, book iii. ch. 3, sect. 6. "The time allowed for the trial and examination of seed grain is ten days; of iron, one day; of bulls and other beasts of burden, five days; of pearls and gems, seven days; of female slaves, one month; of milk cattle, three days; of male slaves, half a month." Catyayana, Digest, book iii. ch. 4, sect. 8; but according to other texts, no retraction is allowed: See Vrihaspati, Degest, book iii. ch. 4, sect. 11. "Let a buyer himself examine the commodity and show it to others; when, after inspection and approbation, he has accepted it, he shall not return it." Catyayana, Digest, book iii. ch. 4, sect. 8. "If a buyer has received the commodity sold, and repent of his purchase, Bhrigu has ordained, that he shall pay a sixth part of the price, when the returns it." See also Yajnyawalcya, book iii. ch. 4. sect. 9, a *merchant*, returning things once bought, shall pay a sixth part as a fine.

2 Hedaya, vol. ii. p. 381, 397. Nareda, Digest, book iii. ch. 4. sect. 10. "A buyer ought at first himself to inspect the commodity and ascertain what is good and bad in it; and what, *after such inspection*, he has agreed to buy, he shall not return to the seller, unless it had a *concealed blemish*."

3 Hedaya, vol. ii p. 398. Nareda, Vrihaspati, Degest, book iii. ch. 4. sect. 10, 11.

4 Hedaya, vol. ii. p. 398. The Hindu Law directs, that the inspection shall take place within a certain time according to circumstances; after the expiration of that time the uninspected thing cannot be returned. See Vyasa, Digest, book iii. ch. 4, sect. 12. "Grass, wood, bricks, thread, common grain not to be sown, wine or other liquids, cloth, base or precious metals, ought to be inspected, immediately." Nareda, Degest, book iii. ch. 4. sect. 13. "Milk cattle should be examined within three days, beasts of burden, within five, but the examination of pearls, gems, and coral, must be within seven days; of male slaves, within half a month; of rice and all other seeds, within ten days; of iorn and wearing apparel, within one day." Vrihaspati "*within* those times, if a blemish be any where discovered in the commodity purchased, it must be returned to the seller, and the purchaser shall take back the price." Menu fixes the time generally at ten days, Digest, book iii. ch. iv. sect. 7.

5 Hedaya, vol. ii. p. 398. 405.

6 Hedaya, vol. ii. p. 400.

7 Hedaya, vol. ii. p. 399.

330. The payment of the price, or the delivery of the thing, or both, may be postponed to a future time. According to the Mahomedan Law, it is necessary to the validity of a sale, that the time should be certain and determinate, and that, whenever a specific and extant thing is sold for immediate payment, the thing should be delivered at the time. In the first case, when, for instance, the delivery is to take place at the time of sowing or ripening, the sale is declared invalid on account of uncertainty;[1] and in the second, when, for instance, the delivery is to take place a month after, it

Payment and delivery may be postponed.

Digitized by Google

is said, that there is no occasion for such delay, the thing being extant, and the payment having taken place.[2] As however there is nothing naturally improper in such a condition,[3] such agreements are now legal and valid, (Sect. 10.) A sale on condition of delivery at the time of sowing or ripening, will become complate, as soon as that time is over, because though it cannot be said on what exact day the delivery is to take place, it is certain, that the seller is in default as soon as the ripening or sowing time is over.

1 Hedaya, vol. ii. p. 364. Princ. Mahomedan Law, p. 44.

2 Hedaya, vol. ii. p. 450.

3 Colebrooke, Contracts and Obligations, sect. 202.

A sale may be conditional.

331. A sale may be made conditional; for instance, a man may buy a thing on the condition, that the thing be found fit for a certain use; or be approved of by another person. Or a man may sell a thing on the condition, that the sale shall be annulled, if he returns the price within a certain time; or, if a certain other person should wish to purchase the thing. In all conditional sales, the validity of the sale is suspended until the occurrence of the stipulated condition, and is either confirmed, or annulled, when the occurrence actually takes place.

Conditional sales under the Mahomedan Law.

332. Under the Mahomedan Law, all conditions that are natural to a sale are valid,[1] but it is illegal to stipulate for conditions;

1st. Which are advantageous to either of the parties; for instance, that the seller shall reside in the house sometime after it has been sold. Conditions of this nature are however often valid by customed and precedent;[2] thus in purchasing unfinished work, it is customary to stipulate that the work shall be finished before delivery, and such a condition is valid.

2nd. Which are repugnant to the requisites of a sale; for instance, that the purchaser shall not sell the thing; that the purchaser shall make a gift of it to another person, &c.

3rd. Which involve the subject of another contract; for instance, that the seller shall reside in the house, which he is selling, on payment of a certain rent; or, that the purchaser shall maintain the seller, or certain other individuals.

Whenever such conditions have been stipulated, it is *not the conditions*,[3] but the sale, that is *invalid*; and, *previous* to the de-

Digitized by Google

livery, either of the parties has power to annul the sale, in order that the invalidity of it may be removed. None of them can consequently enforce the contract in any Court of Justice; only, if the purchaser should have paid a part of the price, such payment may be recovered. *After* delivery only the party stipulating for the invalid condition, or his representative, is empowered to annul the contract, but not the other party.[4] Thus, if A. sells a house to B. on payment of a certain price, and *on condition*, that B. shall maintain him during his natural life; and B., having taken possession of the house and paid the purchase money, refuses to fulfil the condition; the sale is invalid, because the condition his a perfectly distinct engagement, and ought not to have been stipulated for in the sale-contract. A., who is the party who has made the stipulation, is at liberty to annul the contract and recover the house on returning the purchase money, but B., who is not the stipulating party has no right, under plea of its being an invalid sale, to recover the purchase money and return the house. A. cannot inforce the invalid condition, that is to say, he cannot recover his maintenance from B. under the deed, and if he is unable or unwilling to reply the purchase money, the sale will remain in force, as if the sale had been unconditional, and he has no remedy.[5]

Right of pre-emption and of redemption.

The right of pre-emption and the right of redemption are some of the most common conditions in a sale. Under the Mahomedan Law the first should always be provided for in a separate contract; the last cannot be stipulated for *in* the deed of sale for a longer period than three days,[6] but in a separate agreement, it may be agreed upon for any length of time.[7] When no limit is mentioned in the agreement, it will not be barred by lapse of time under the rules of limitation.[8] This right is generally stipulated for under form of a mortgage by a bye-bill-wufa, viz., a mortgage for the security of money lent on the condition, that if the money is not repaid within a certain time, the property mortgaged shall become the property of the mortgagee, for the sum lent.

A purchaser under an invalid sale may legally sell the thing.

If the purchaser takes possession of the article under a conditional sale, and then sells it, the second sale is valid, because such conditional sales are legal in their essence, and invalid only on ac-

Digitized by Google

count of their form, and the first seller's right to annual the sale and recover the thing on repayment of the price, is lost.[9]

On the death of the seller, the right of annulling the sale devolves on his executor, heirs or creditors, but neither can they resume the goods from the purchaser until they restore the purchase money; the goods being considered as pledged to the purchaser until the price is restored to him.[10]

1 There are five kinds of conditions in contracts of sale under the Mahomedan Law: 1st, option of acceptance; 2, optional conditions; 3, option of determination; 4, option of inspection; and 5, option on the discovery of a defect. An option of acceptance is a liberty which either of the parties, in a contract of sale, has of withholding his acceptance, after the tender of the other, until the breaking up of the meeting. An *optional condition* is where one of the parties stipulates for a period of three days before he gives his final assent to the contract. An *option of determination* is where a person, having purchased one out of two, or three homogenous things, stipulates for a period to enable him to fix his choice. *Option of inspection*, is the power which the purchaser of a thing unseen has of rejecting it after sight. *Option on the discovery of a defect*, is the power which the purchaser has of dissolving the contract on the discovery of a defect in the merchandise. Hedaya, vol. ii. p. 380, note.

2 Hedaya, vol. ii. p. 446.

3 Hedaya, vol. ii. p. 455. In the case Mirza Bebee *versus* Toola Bebee, S. D. A. Rep. vol. iv. p. 334, there is a futwa to the effect, that the conditions in an invalid conditional sale, are null and void, but do not vitiate the sale, which is incorrect.

4 Hedaya, vol. ii. p. 455.

5 In the case Mirza Bebee *versus* Toola Bebee, S. D. A. Rep. vol. iv. p. 334, a sale of certain talooks had been contracted for on the condition, that the purchaser should manage and enjoy possession of the property during her life time, but without the power of alienating it by sale or gifts, and should support and educate certain children, to whom the property was to go on the death of the purchaser. The suit was instituted only to uphold the validity of the conditions, and it was decided that, under the Mahomedan Law, the conditions were invalid; no demand was brought for the restitution of the consideration, which had been paid, to which the heirs of the seller undoubtedly were entitled.

6 See note 1

7 Beharee Lal *versus* Sookhum, S. D. A. Rep. vol. iv. p. 174.

8 Muhronnissa Khanum *versus* M. Budamoon, S. D. A. Rep. vol. i. p. 185.

9 Hedaya, vol. ii. p. 455.

10 Hedaya, vol. ii. p. 456.

The rules regarding conditional sales of the Mahomedan Law, how far effective.

333. It is doubtful how far the above rules of the Mahomedan Law are in force at present, either generally, or at least among Mahomedans. (See Sect. 10.) It seems proper, that they should

Digitized by Google

not be considered in force, as there is nothing contrary to natural justice in stipulating for conditions, which are advantageous to either of the parties, or which involve different contracts; on the contrary, it is more natural and less liable to misunderstanding and doubts,[1] to insert in one deed every particular relative to the actual intention of the parties touching the principle agreements, than to have several deeds for the same purpose.

When the parties to the contract are of different persuasions, or are neither of the Mahomedan, nor of the Hindu persuasion, the sale, though contracted contrary to these rules, is valid under Reg. 7, 1832, Sect. 9, which prescribes, that the law of these religious shall not be allowed to operate so as to *deprive* such party of any property, to which he would have been entitled, but for the operation of such law. When parties are of different persuasions.

According to the Hindu Law, it is the intention and consent, which forms the obligation of every contract; if the conditions are but lawful in themselves, neither the contract, nor the conditions become invalidated by reason of being advantageous to either of the parties, or having been united in one deed or engagement, although they might have been separated in several.

1 In the case Beharee Lal *versus* M. Sookhun, S. D. A Rep. vol. iv. p. 174,—where the seller had sold a property by one deed, and stipulated for the right to redeem the property in seven years by another deed, which was in strict conformity with the above rules of the Mahomedan Law, it was made a subject of doubt, whether the sale had actually been conditional.

2. *Who can sell and purchase.*

334. Every person able to contract, is generally able to sell and purchase.[1] Who can sell and purchase.

A minor or one of unsound mind cannot sell his property, but his guardian may sell for him in case of evident gain, or absolute necessity; the purchaser must ascertain that these facts really exist, otherwise the minor may recover the property, even from one who has purchased in good faith.[2] A minor may purchase necessaries, but cannot generally bind himself; a purchase made by him at any time before he comes of age may be set aside on account of his incapacity to contract, but his guardian may ratify his contracts, and thus make them binding upon the other party. A minor.

Digitized by Google

A married woman.

Under the Mahomedan Law, a married woman can sell her own property, without the consent of her husband. Under the Hindu Law, the consent of her husband to the sale of her own property is only necessary for the sale of immoveable property received from him.[3] A married woman cannot of course sell any property belonging to her husband without his consent, nor can she generally make any purchase, binding upon him, without his assent, precedent or subsequent, express or implied.

A widow.

A widow has of course the free disposal of her own property; but as a Hindoo widow has only a life-interest in the property she has inherited from her husband, or that has accrued therefrom, she cannot sell any part of such property, except for indispensible duties, for her maintenance, or for the spiritual benefit of her husband, (Sects. 165, 166). Neither can she dispose of immoveable property obtained by gift from her husband, (Sect. 262), except for the same reasons.

It is obligatory upon the purchaser to ascertain these facts, otherwise the heirs may recover, even from one who has made a purchase in good faith.[4]

An Executor, Administrator, and Curator.

An Executor may sell property belonging to the estate under his charge; (Sect. 68,) and so may an Administrator, if his appointment, (Sunnud,) contains nothing to the contrary, (Sect. 72, 75,) but a Curator cannot sell any part of the estate without a special power from the Court. (Sect. 78).

Sale on death-bed.

A sale made by a person on his death-bed is valid, when the seller at the time was of sound mind, but a sale under such circumstances *for an under value* is under the Mahomedan Law considered as a bequest,[5] and valid only as far as it is within the legal one-third, of which a person may dispose by will. A. death-bed sale to an heir is in valid without the consent of the other heirs.[6]

Sale of property acquired in a fictitious name.

In an acquisition in a fictitious name, a benamee, or farzee acquisition, the right to sell and dispose of the property vests in the real, and not in the fictitious owner,[7] except when lands paying revenue to Government are bought at public sales, when the substitution of the name of any other person, than the real purchaser, is declared illegal. Reg. 7, 1799, Sect. 29, Cl. 3. Reg. 12, 1841. Sect. 22. In purchases of estates bought at public

Digitized by Google

sales in a fictitious name, the person, who furnished the money to the nominal purchaser, may recover such sums from him,[8] but he cannot recover, or legally dispose of, the lands. When the agent subsequently transfers the lands to the real purchaser, the transfer is legal and valid, and will not be invalidated by the illegal manner in which it was bought.[9]

That the purchase was made in a fictitious name, how to be established.

All purchased property is necessarily to be considered at first as belonging to the person stated in the deed to be the purchaser, and he cannot, under the plea that the purchase was made in a fictitious name, be called upon by the other party to prove that he paid the purchase money, or actually possessed and enjoyed the property. But, when it has been fully established by the other party, that the nominal proprietor did neither pay the purchase money, nor afterwards possess and enjoy the property, the deed of sale is necessarily fictitious. If then the nominal purchase should advance, that the purchase was intended to be a bonâ fide gift to him from the person who actually furnished the money, he must substantiate this assertion by good evidence, because it is contrary to the letter of the deed; and even in that case the gift will be invalid under the Mahomedan Law, if he has not help possession personally, or by another. (See Sect. 256, 269, note 1.)

1 Colebrooke, Obligations and Contracts, Sect. 56 to 65.

2 Hedaya, vol. i. p. 115. Princ. Mahomedan Law, p. 306. Ranee Hissenmonee *versus* Rajah Oodwunt Sing, S. D. A. Rep. vol. iii. p. 228. Juggomohun Bose *versus* Petamber Ghose, ibid, vol. v. p. 82. Princ. Hindu Law, vol. ii. p. 293.

3 Daya Bhaga, ch. iv. sect. 1, No. 23. S. D. A. Rep. vol. ii. p. 314. See Sect. 262, note 8.

4 See note 2.

5 Hedaya, vol. iv. p. 503.

6 Hedaya, vol. iii. p. 164.

7 Sheoram Ghose *versus* Dattaram Ghose, S. D. A. Rep. vol. ii. p. 53 Oomaid *versus* Khyrat Aly, ibid, vol. iii. p. 258. Amane Tewaree *versus* Raj Rughoo Bans Sutai, ibid, vol. iii. p. 363. Reg. 17, 1793, Sect. 27; "persons who tenant and underfarm lands in the name of their children, dependants or others, or in the name of fictitious person, and give themselves as the ostensible sureties for the performance of the agreement, but retain the actual management of the lands, and in fact are themselves the under farmers or ryots of such lands, *shall to all intents and purposes* be considered as the under farmers or royts

Digitized by Google

of such lands, and their property shall be liable to be distrained and sold for arrears under this Regulation in the same manner as if the engagement for the lands had stood in their own names." Const. No. 648, 22nd July, 1831, para. 2, "the circumstance of an estate being recorded in the Collector's records in the name of another person than him against whom the execution of the decree was sued, is not sufficient to warrant the Collector to decline to bring to sale, *unless* a claim were preferred or objection offered, in which case the Collector should proceed in the manner laid down in Reg. 7, 1825, Sect. 4, Clause 5."

8 Ram Manick Moody *versus* Joynarain, S. D. A. Rep. vol. i. p. 289, Dilaram *versus* Roopchand Shaha, ibid, vol. iii. p. 24.

9 S. D. A. Rep. vol. i. p. 292, note.

Who are specially prevented from buying and selling.

335. Some persons are however by their situations, or by a special law, prevented from selling or purchasing certain things, whether personally or by others :

1. Civil and Military officers are not to sell private property exceeding the value of 5000 Rupees to Native Princes, without the concent of Government; Govt. Letter, 31st October, 1821; and Civil servants selling private property to Natives are always to report to Government the actual cost of the property to be sold by them, the name of the purchaser, his situation, and the amount of the purchase money. Govt. Letter, 19th Sept. 1837.

2. A Guardian cannot purchase the property belonging to his ward.[1]

3. An Agent cannot purchase the goods he has been empowered to sell, when the price has not been fixed by the owner.

4. An Executor or Administrator cannot purchase things under his own charge.

5. Deputy Collectors, Reg. 11, 1822, Sect. 18, 20. Cir. Order, 15th September, 1843, (Govt. Gaz. p. 406); native officers, and private servants and dependants of Collectors and Assistants, cannot purchase lands disposed of by the Collectors at public auction. Reg. 2, 1793, Sect. 15. Ben. Reg. 5. 1795, Sect. 15. Ced. Prov. Reg. 25, 1803, Sect. 14; Reg. 11, 1822, Sects. 18, 20. Native officers of the judicial department are at liberty to purchase lands at the public sales, but are to report to the Judge whatever lands they possess or purchase. Cir. Order, 25th July, 1811.

6. The distrainer, the cauzy, and the appraisers of distrained property, cannot purchase any part of the distrained property a

Digitized by Google

a public sale under forfeiture of the purchase money. Reg. 17, 1793, Sect. 24. Beng. Reg. 45, 1795, Sect 22. Ced. and Conq. Prov. Reg. 28, 1803, Sect. 22; nor is the defaulter or any person on his behalf, permitted to purchase the property. Ibid, 1793, Sect. 25. Ben. 1795, Sect. 23, 1803, Sect. 23; Reg. 8, 1819, Sect. 9.

Defaulting landholders, farmers and sureties, whose lands may be sold by public sale for the discharge of arrears of revenue to Government, were forbidden to become purchasers of their own lands so disposed of by Reg. 7, 1799, Sect. 29, Cl. 4; but this has been rescinded by Reg. 12, 1841, Sect. 30.

7. Licensed venders of spirits or drugs are not allowed to take goods or wearing apparel in barter for liquor or drugs. Reg. 20, 1817, Sect. 28, Cl. 4.

1 Hedaya, vol. iv. p. 214.

3. *What things can be sold.*

336. All things, which are articles of commerce, or fall under that denomination may be bought and sold, if not exempted from traffic, either by their nature, or by positive laws, or by consecration to pious purposes, or by having been set apart for public uses. What things can be sold.

According to the Mahomedan Law, the subject matter of a sale must be determinate, so as not to admit of future contention regarding the meaning of the contracting parties; but when the uncertainty is removed prior to the actual arrival of the period stipulated for, the sale becomes again valid.[1] The thing must also be in actual existence at the period of making the contract, so as to be susceptible of delivery, either immediately, or at some future definite period.[2]

1 Hedaya, vol. ii. p. 450.

2 Hedaya, vol. ii. p. 449. Princ. Mahomedan Law, p. 43.

337. The sale of the property of another person, without a power for the purpose, is null and void;[1] therefore: Sales void for want of proprietary rites.

1. The master of a ship cannot sell the ship, nor the goods in the ship, without a special power, or except in cases of absolute necessity, because he is only appointed to convey the ship and the goods from port to port. Master of a ship.

Managing partner.

2.* The managing partner of joint property cannot sell the entire property, or more than his own share, without the consent of the other partners,[2] except in cases of necessity when they are minors, or absent,[3] because he was appointed, expressly or tacitly, only to *manage* the property, not to dispose of it. Whenever the sale of a part of the joint property becomes requisite, the consent of all the partners must be obtained. If the property is sold without the consent of the other partners, the sale is invalid among Hindoos, according to the Bengal school, as it regards the share of the other partners,[4] but valid as to the share of the managing partner. According to the Benares and Mithila school, however it is wholly invalid without a prior division.[5] But if the sale was necessary, the managing partner may recover from his co-sharers.[6]

Hindu widow.

8. A Hindu widow cannot sell her husband's property except for good reasons, (Sect. 164, 165, 270,) because she has only a life-interest in it. A daughter, mother and grandmother succeeding to property as such under the Hindu Law, can, for the same reason, sell such property only under the same circumstances. (Sect. 151.)

Manager of endowed property.

4. A manager of endowed property cannot sell any part of it, as it belongs to the institution, not to him; but if the endowment was only nominal, viz., if the endowment was made without the consent of Government, and the income was applied to personal use, and the endower continued to exercise individual proprietary rights, the property can be sold like other private property.[7] (Sect. 205.)

When such property has fallen into decay and cannot conveniently be repaired, or is not calculated to afford any material convenience to the public, the Government may, on the recommendation of the Board of Revenue, in whom the general superintendence of all endowed property is vested, order such property to be sold, or otherwise disposed of. Reg. 19, 1810, Sect. 4.

5. An heir cannot sell the property he expects to inherit from his parents, or other relatives, because as long as the inheritee is in existence, the heir apparent has no right or interest in such property.[8] (Sects. 237, 271.)

Digitized by Google

1 Hedaya, vol. ii. p. 508, Menu, book viii. sect 199. Digest, book ii. ch. 5, sects. 26, 27. See also Sect. 270, note 1.

2 Digest, book ii. ch. 1, sect. 6. Vyasa, " a single partner ought not, without the consent of his copartners, to sell or give away immoveable property of any sort, which the family only holds in coparcenary." Princ. Hindu Law, vol. ii. p. 295.

3 Princ. Hindu Law, vol. ii. p. 297, 300, 310.

4 Daya Bhaga, ch. ii. No. 31. Komla Kanto Ghoussaul *versus* Ram Hurree Nund Gramee, S. D. A. Rep. vol. iv. p. 196.

5 Mitacshara on Inheritance ch. i. sect. 1. Nos. 28, 30. Nundaram *versus* Kashee Pandee, S. D. A. Rep. vol. iii. p. 232; vol. iv. p. 70. See Sect. 281.

6 Gour Kissor Acharjee *versus* Sheeo Buksh Sing, S. D. A. Rep. vol. ii. p. 64.

7 Mahatab Chand *versus* Mirdad Ali, S. D. A. Rep. vol. v. p. 268.

8 Princ. Mahomedan Law, p. 90. M. Khanum Jha *versus* M. Jhan Bebee, S. D. A. Rep. vol. iv. p. 213.

Owner can dispose of his rights.

338. When however the seller has ownership in the thing, he can legally transfer the whole or any part of it, thus :

Zemindaries.

1. A Zemindar can sell his estate (Reg. 1. 1793, Sect. 9,) or any portion of it, but the sale of a portion is not valid against the rights and claims of Government until a division of the estate and of the rent is made, with the approbation of the Board of Revenue and the Governor General in Council.[1] Reg. 1, 1793, Sect. 10. (Sect. 283). A Zemindar cannot however sell or transfer any other, or any greater right then he himself possesses. If he has encumbered the estate by mortgages, tenures, at an under-rent, or the like, the encumbrances follow the estate, when he sells it. Even at public sales in execution of decrees it is only the rights of the party that are sold and transferred, and the rights of Government, of mortgagers, co-sharers and others, remain unimpaired, and may be enforced against the purchaser. Cir. Order, 10th June, 1842, (Govt. Gaz. p. 398), but when the estate is sold by public sale for arrears or revenue all encumbrances imposed on the estate after the time of the settlement, become cancelled ; (Reg. 12, 1841, Sect. 28,) if not specially reserved. Ibid, Sect. 29.

The owner of a saleable under-tenure can likewise sell his rights, and the purchaser will then stand exactly in the place of the former proprietor, so that when the middle tenure becomes cancelled, the under tenure becomes cancelled also. Reg. 8, 1819, Sect. 11.

Ancestorial property.

2. Ancestorial property my be sold, as well as self-acquired

property ; the sons have no ownership in the property as long as the father is alive.[2]

Mortgaged property.

3. A mortgaged property may be sold by the owner ; the purchaser acquires the property with the encumbrance, and the mortgagee's rights are not invalidated by the sale. Cir. Order, 10th June, 1842, (Govt. Gaz. p. 398). A property mortgaged and conditionally sold by a a bye-bill-wuffa, may be sold absolutely to any other person as long as the conditional sale has not become absolute.[3]

Joint property.

4. A portion of joint property may be sold without prior division under the Mahomedan,[4] as well as under the Hindu Law, according to the Bengal School,[5] but not according to the Benares and Mithila school, until a division has taken place, or the assent of the co-sharars has been obtained.[6] (Sect. 281.

1 That the lands have been separated and assessed by the Collector, (but without the consent of the Board of Revenue,) will not bar the right of Government. Sham Raja *versus* the Collector of Jessore, S. D. A. Rep. vol. i. p. 239.

2 Daya Bhaga, ch. ii. No. 8. Komla Kanto Chuckerbutty *versus* Gooroo Govindo Chowdhry, S. D. A. Rep. vol. iv. p. 322.

3 Princ. Mahomedan Law. p. 175.

4 Hedaya, vol. ii. p. 440. Princ. Mahomedan Law, p. 167, 172.

5 Princ. Hindu Law. vol. ii. p. 291, 293, 295.

6 Princ. Hindu Law, vol. ii. p. 306. 313. Sheo Surrum Misser *versus* Sheo Sohai, S. D. A. Rep. vol. iv. p. 158. Nundaram *versus* Kashee Pandee, ibid, vol. iii. p. 232 ; vol. iv. p. 70.

Things exempted from traffic.

339. The following things are by nature, or by positive laws, exempted from traffic :

1. All personal rights, such as offices, pensions,[1] sacrificial fees, (Sect. 270,) right of inheritance, (Sect. 337, No. 5,) right of pre-emption,[2] and so forth.

2. According to the Mahomedan Law the sale of a freeman was null and void,[3] but under the Hindu Law, a sale of wife and child with their assent, was valid in times of distress, (Sect. 270, note 1). The sale of a slave was valid according to both ; but by Reg. 5, 1843, Sect. 2, no rights arising out of on alleged property in the person and services of another as a slave, shall be inforced by any Court.

3. Neither lands, houses, or other real property of under far-

Digitized by Google

mers and ryots or the talookdars paying revenue through them; nor the loom, thread, unwrought silk, or materials of manufacture of any weaver or manufacturer; nor the tools of any tradesman, labourer or artisan, standing in the relation of under farmer, ryot, or dependant talookdar to the distrainer, nor the ploughs, or other implements of husbandry, bullocks and other cattle employed in agriculture, or seed grain, can be distrained and sold *for arrears of rent*. Reg. 17, 1793, Sects. 3, 4. Ben. Reg. 45, 1795, Sects. 3, 4. Ced. and Conq. Prov. Reg. 28, 1803, Sects. 3, 4; Reg. 5, 1812, Sect. 14. But such property may be sold in execution of a decree. Const. No. 962, 31st July, (26th June,) 1835.

4. Salt advances, and implemets for the manufacture of salt belonging to Government in the hands of salt manufacturers, cannot be distrained, or sold. Reg. 10, 1819, Sect. 20, Cl. 2.

5. Mudduck, a composition of Opium and palm-leaves, and koppah, are not allowed to be sold on account of their noxious quality. Reg. 10, 1813, Sect. 17, Cl. 2.

Things exempted from traffic under the Mahomedan Law.

The sale by Mussulmans of wine, pork, carrion, blood, silk worms and several other things, is forbidden by the Mahomedan Law,[4] and the traffic by Brahmins in liquids of all sorts, dressed grain, seeds of tila, stones, salt, cattle and human creatures, sugar, indigo, lac, and several other things, is forbidden by the Hindu Law,[5] but these being only moral and religious prohibitions referring to their respective creeds, such sales are not considered as invaild under the civil law, nor is any attention paid to these prohibitions in the Civil Courts at the present time.[6]

[1] Const. No. 788, 3d May, 1833, Pensions granted by Government are not liable to attachment in satisfaction of decrees of Court.

[2] Hedaya, vol. ii. p. 428.

[3] Hedaya, vol. ii. p. 430.

[4] Hedaya, vol. ii. p. 428 seq.

[5] Menu, book x. sects. 86 to 94.

[6] Synd Khadim Ullee *versus* Duljeet Sing, S. D. A. Rep. vol. ii. p. 255. A Mussulman can stipulate for his legal interest, though his religion forbad his taking interest. Joy Narain Muckerjee *versus* Bul Ram Roy, S. D. A. Rep. vol. iv. p. 87, that though traffic in wine by a Brahmin is contrary to the Shaster, that is no matter for consideration in the Civil Court.

Digitized by Google

5. *On the from of a Sale.*

From of a Sale.

340. The law does not prescribe any particular form for a sale. It may either be made verbally, or executed in writing, and however informal,—for instance, if not signed by the parties,—the contract is valid, when actual tender and acceptance of the parties can be substantially proved.[1] When the deed is executed in writing, it must be written upon stamp-paper of a value responding to the amouut of the purchase, whether the sales was private, or public for the recovery of arrears of revenue or rent, or in satisfaction of decrees of Court, Reg. 10, 1829, A. 18, and sigued and witnessed, Reg. 3, 1793, Sect. 15, and may be registered. When registered, the sale has preference over a prior unregistered sale or gift. Reg. 36, 1793, Sect. 6, Cl. 1. Ben. Reg. 28, 1795, Sect. 2. Ced. and Conq. Prov. Reg. 17, 1803, Sect. 6, Cl. 1; Reg. 1, 1843; Reg. 19, 1843, Sect. 2.

In former times lands were transferred by a symbolic delivery of gold and water,[2] but this has now become obsolete, and real property is transfered by agreements, without any particular formality.

It is customary at the bottom of the deed to use expressions somewhat of this kind: "do you, (the purchaser,) your son, grandson, and so forth, possess and enjoy this property" in order to signify, that the sale was hereditable. These expressions are however prefetly superfluous, and the entire omission of them will not cause the property to be considered as not heritable. The right of the seller in the property, and neither more nor less, is, by a sale, transferred to the purchaser, when nothing to the contrary is agreed to between the parties; and these rights pass from the purchaser to the person to whom he may transfer them, or to his heirs.[3] Whenever it is the ietention of the parties, that the possession and the use of the property should be transferred to the purchaser only for his life-time, this must be distinctly stated in the deed, which then becomes in fact a lease for a consideration, and not a sale, though so denominated in the deed.

It is also customary to take the signature of the nearest relatives or of neighbours, besides the signature of those who only cer-

Digitized by Google

tify to the execution of the deed. Their signature is however affixed only to prevent future disputes,[4] and is not at all necesary to the validity of the transfer, except they were either partners, or had a right of pre-emption. (Sec. 413.)

1 Princ. Mahomedan Law, p. 174.

2 Digest, book ii. ch. iv. sect. 33: "Land is conveyed by six formalities, by the assent of townsmen, of kindred, of neighbours, and of heirs, and by the delivery of gold, and of water." Mitacshara on Inheritance, ch. i. sect. 1, No. 31, 32.

3 See Chowdree Dood Raj Singh *versus* Moohummud Yahia Kha, S. D. A. Rep. vol. iii. p. 332, and Joha Singh *versus* Meer Nujeeb Ollah, ibid, vol. iv. p. 271, that a Mokoreree lease continues to the heirs of the grantee, if not distinctly stated to be for the life of the graute only. See also Sect. 325.

4 Mitacshara on Inheritance, ch. i. sect. 1, No. 30.

341. Whenever a term is fixed for the fulfilment of a sale, it is customary, but not necessary, to pay a small sum as *earnest money*. This sum forms a part of the price, and is paid in order to bind both parties more strongly to the fulfilment of their agreement. The effect of payment of earnest money, is: Earnest.

1st. That it proves the sale to have been finally settled,[1] though the special conditions of the sale may still be disputed.

2nd. That the purchaser, in case of non-fulfilment of the contract on his part in conformity with the stipulated conditions, forfeits the sum thus paid.[2]

3rd. That the seller, in case of non-fulfilment of the contract on his part, is liable to pay a sum equal to that received as earnest in lieu of damages.[3]

When a sale has been finally settled, the parties can of course enforce the fulfilment of it, whether earnest money was paid or not, and recover damages for breach of the contract for any loss they may have suffered. But when earnest money has been paid, the seller is not under the necessity of suing for damages, if he is satisfied to take the sum he has received as earnest, in lieu of damages. This sum is forfeited to the seller, whether his actual loss amounted to that sum, or not. The purchaser, under the same circumstances, can recover double the sum paid as earnest from the seller, viz., the sum actually paid, and an equal sum as damages, without any proof of the actual loss he has sustained.

Digitized by Google

The seller cannot of course recover damages, in addition to keeping the earnest money, but he can do either; if he recovers damages, the earnest money must be returned, or deducted.

1 Ram Cobindo Singh *versus* Baicharam Chose, S. D. A. Rep. vol. ii. p. 123.

2 Digest, book iii. ch. 3, sect. 36. Vyasa: "by him, who has given earnest, and appointed *no spseific time* for delivery, it shall be foreited if he refuse to accept the commodity, *when offered.*"

3 Digest, book iii. ch. 3 sect. 35. Yajnyawalcya: "what is paid for the ratifying of the bargain is called earnest; he who sells a thing to another for which he has received earnest, shall be compelled to repay two fold a sum received as earnest."

Advance on work.

342. Somewhat like a sale in which a sum of money has been paid as earnest, is that kind of sale, in which a person orders a thing from a workman, or a manufacturer, and pays him either the whole price or an advance thereon on the condition, that the thing so ordered shall be delivered at a certain future time.

He who makes advances becomes owner of the unfinished work.

In this kind of bargain, the sale is established at the time of the agreement. The seller is from that time owner of the price, or the advance, and the purchaser is owner of the thing which he has ordered. Therefore, 1st. if the purchaser does not receive the thing at the time stipulated, and pays the remainder of the purchase-money, the seller cannot, strictly speaking, sell it to another, which would be a sale of another man's property, but he can re-sell it to another person, to recover the balance due to him, and the debt of the purchaser to the seller will thus be paid by means of the price; 2ndly. the creditors of the seller cannot attach, or sell, an article on which an advance has been paid as such an article is no longer his property.[1]

But may reject the work on inspection.

On delivery of the thing by the seller to the purchaser, the purchaser is entitled to reject it on inspection, because it was bought without inspection.[2] Aboo Yoosuf however is of opinion, that the purchaser has on such right, as it might be an injury to the seller, since if he rejected the goods, other people might not choose to purchase them for their value; for instance, if a rich man ordered goods of a peculiar and expensive kind, and afterwards rejected them, common people would not purchase such articles for their value.[3] It seems equitable that the purchaser should have the right of rejecting the thing on inspection

Digitized by Google

whenever the thing is of common and general use, without giving any particular reason for doing so; but that he should not have this right when the thing is of a peculiar and expensive kind, except for good and sufficient reasons; as for instance, on an order for cloths, when they neither fit the person for whom they were made, nor can be made to fit properly by any alteration.

Exception.

[1] Hedaya, vol. ii. p. 546.
[2] Hedaya, vol. ii. p. 540.
[3] Hedaya, vol. ii. p. 541.

6. *On Sales by Auction.*

343. Sales are either public or private. It is a private sale, when the owner himself transfers his proprietary rights to another; it is a public sale, when the property is sold by auction to the highest bidder. Every person is at liberty to dispose of his property by public outcry to the highest bidder;[1] but there is no public officer within whose duties it falls to conduct such sales at the request of private individuals, except in execution of decrees, and for arrears of rent. Whether the officers who conduct such public sales, are allowed to hold a public sale at the request of the owner, is doubtful.

Sales are public or private.

[1] Hedaya, vol. ii. p. 462.

344. The public sales for which the Regulations contain rules under which they are to be conducted, are:

Public sales according to the Regulations

1. Sales of estates for arrears of the public revenue.
2. Sales of Putnee talooks for arrears of rent due to the proprietor.
3. Sales of personal property for arrears of rent.
4. Sales of real and personal property in execution of decrees.

1 *Sales of Estates for Arrears of the public Revenue.*

345. Whenever the whole, or a portion of a kist or instalment of the land revenue of any month of the year of any Mehal in the permanently settled districts is unpaid on the first of the following month, the Collector is to put up such an estate to sale by public auction, and sell it to the highest bidder, if the arrears are unpaid at sunset on the day preceding the day fixed for sale. Reg.

Sale of Estates for arrears of Revenue, when to take place.

Digitized by Google

12, 1841, Sect. 5, 6; but in the non permanently settled districts, and in the Province of Benares, the previous sanction of the Sudder Board of Revenue is to be obtained in each several case of sale. Ibid, Sect. 4.

Sale by whom conducted.

346. The sale is to be conducted by the Collector or such other officer, as the Government may authorise. Reg. 12, 1841, sect. 12.

Sale where to be held.

347. The sale is to be held in the Cutcherry at the Sudder station of the district, in which the estate, for the arrears of which the lands are to be sold, is situated; but the Sudder Board may prescribe some other place for holding the sale when they shall consider it beneficial to the parties concerned. Reg. 12, 1841, Sect. 12.

Sale when to be held.

348. In the permanently settled districts the sale is to take place only four times in the year. These periods are to be fixed by the Board, and announced three months previously in the Calcutta Gazette, and in the office of the Collector, or other officer authorize to hold such sales, and in the Court of the judge, the Magistrate, the Principal Sudder Ameen, the Sudder Ameens, and Sudder Moonsiffs; and another notice is to be given by the Collector 15 days previous to *each* fixed date of sale stuck up in the same offices. Reg. 12, 1841, Sect. 3.

The dates fixed by the Board are to be in force untle altered according to Cir. Order, 22nd January, 1842, (Govt. Gaz. p. 59.)

In districts and for Mehals in which the Bengal or Umlee Era is current, with the exception of Zillah Sylhet:

28th June, 28th September, 28th December, and 28th March.

In the Zillah Sylhet:

28th September, 18th June, and 18th April.

In districts and for Mehals in which the Fusly Era is current:

7th June, 28th September, 28th December, and 28th March.

In the Chittagong Division, viz. Chittagong, Tipperah and Bulloah, the dates have been fixed and advertized by the Commissioner of that division.

Petty Estates, the Jumma of which do not exceed 100 Rupees, are liable to sale only once, twice, or three times in the year, according to the amount of their respective Jummas; viz.

Digitized by Google

Bengal and Umlee Mehals. Estates with a Jumma of 10 Rupees and under, in March ; exceeding 10, and not exceeding 50 Rupees, in December and March ; exceeding 50 and not exceeding 100 Rupees, in December, March and June.

Fusly Mehals. Estates with a Jumma of 10 Rupees and under, in June ; exceeding 10 and not exceeding 50 Rupees, in December and June ; exceeding 50 and not exceeding 100 Rupees, in December, March and June.

When the day falls on a holiday, the sail is postponed to the first open day after the expiration of the holiday, and the opening of the civil court ; Cir. Order, 30th June, 1843, (Govt. Gaz. p. 265) and when the Collector is unable from sickness, or from any other cause, to commence the sail on the days fixed, or having commenced it, be unable to complete it, he may adjourn it from day to day, recording his reasons, informing the Commissioner of Revenue, and noticing the adjournments by a written proclamation stuck up in his Cutcherry. Reg. 12, 1841. Sect. 13.

349. Fifteen days notice is to be given by the Collector by a notification to be fixed ; 1, in his Court ; 2, in the Court of the Judge ; 3, in the Courts of all the Principle Sudder Ameens, Sudder Ameens, and Moonsiffs of the district ; 4, at the Police Thannah of the division ; and 5, at the Cutcherry of the Malgoozar of the estate, or at some conspicuous Place upon the estate. Sale how to be noticed.

The notification is to contain ; 1, the day of the sale ; 2, the amount and nature of the arrear, or demand ; 3, the assurance that no payment or tender of payment made after sunset of the day, preceding the fixed day of sale, will interfere with the sale, either at or after the transaction.

That the notification has been fixed at the places named above, is to be proved in the first four cases by the acknowledgment of the officer at whose office the publication has been made, and in the last, by the certificate of the Peon or other person employed for that purpose. Reg. 12, 1841, Sect. 8.

350. On the day of the sale, the sales are to proceed in regular order according to the number of the estate on the Towjee or Order of sale.

Digitized by Google

Register in the Collector's office ; the lowest number first, Reg. 12, 1841, Sect. 14, Cir. Order, 6th October, 1841, Para. 10, (Govt. Gaz. p. 410,) and the estate is to be sold to the highest bidder. Immediately after the sale, the Collector is to issue a proclamation to be fixed up in his Cutcherry, and in the Cutcherry of the Moonsiffs and the Darogahs in whose jurisdiction part of the estate may be situated, and in the Cutcherry of the Malgoozar, or in some conspicuous place on the estate, forbidding the tenants to to pay any rent which falls due subsequent to the day therein specified, on pain of not being entitled to credit such sums in their accounts with the new puchaser. Reg. 12, 1841, Sect. 17.

Notice that the Estate has been sold.

Payment of the sale amount.

351. On the day of sale, or as soon after as the Collector may think necessary, the puschaser is to deposit a fourth part of the amount of his bid in Cash, Bank of Bengal Notes, or Post Bills, or Government Securities duly indorsed ; and the remainder within 30 days after the day of sale. Reg. 12, 1841, Sect. 15.

If the purchaser is unable to make the deposit required, the estate is forthwith to be put up again and sold ; ibid, Sect. 15, and he will be punished for contempt by a fine not exceeding 200 Rupees, commutable to imprisonment in the civil jail for a period not exceeding one month. Ibid, Sects. 32, 33.

If the puchasere does not pay the balance of the amount of sale before sunset of the thirtieth day, the deposit becomes forfeited to Government, and the estate will be instantly resold, after previous legal notice and publication as above, at the risk of the purchaser, who is answerable for all loses, which include all instalments of revenue, which fall due between the day of the first sale and that on which the resale takes place, Reg. 12, 1841, Sect. 24, without being entitled to any surplus which might be obtained by the resale. Such surplus will be carried to the credit of the defaulting proprietor. Ibid, Sect. 16.

Sale when to be final.

352. A sale does not become final and conclusive before noon on the thirtieth day from the day of sale, reckoning the day of sale as the first, or, when an appeal has been preferred against the sale to the Commissoner of Revenue, from the date of the

Digitized by Google

dismissal, if more than 30 days from the day of sale, Reg. 12, 1841, Sect. 20. The proprietor is at liberty to appeal against the sale to the Commissioner of Revenue within 15 days after the day of sale ; if the sale should be annulled by the Commissioner or by the Government, the purchaser will receive back the sums he has paid, with interest at the highest rate of the public securities, from the dates on which they were respectively paid in, to the day on which the refund is actually made ; ibid, Sect. 22, and if the sale was occasioned by the neglect of the proprietor, the purchaser is besides entitled to a moderate compensation for his loss from the proprietor, not exceeding interest at the current rate of Government securities on the amount of deposit or balance of purchase money during the period of its being retained in the Collector's office, which compensation is to be fixed by the Commissioner. Sect. 18. When the sale is annulled by the order of Government, the Government will award such damages to the purchaser from the proprietor as may appear equitable and proper. Ibid, Sect. 19.

Effect when annulled.

353. If the sale has not been annulled, and the purchaser has paid the amount of the sale, the sale becomes final and conclusive at noon on the thirtieth day, and the purchaser takes possession of the estate as his property from the day of the sale. Reg. 12, 1841, Sect. 24.

Certificate of title.

The Collector is to give the purchaser a certificate of title, and notify the transfer by a written proclamation in his own Cutcherry, and in those of the Moonsiff and the Darogah of the jurisdictions within which any part of the estate is situated, and also at the Cutcherry of the Malgoozar of the estate, or on some conspicuous place on the estate. Ibid, Sect. 27.

354. By a sale for arrears of revenue, the Government transfers its right of revenue from the Estate, and in the settled districts of Bengal, Behar and Orissa, the purchaser therefore acquires the estate free from any encumbrances, which may have been imposed upon it after the time of the settlement, and is entitled after notice given under Reg. 5, 1812, Sect. 10, to enhance at discretion the rents of all under tenures, except:

Rights transferred to the purchaser in the permanent settled districts.

Digitized by Google

1. Tenures which were held as Istemraee or Mocurreree at a fixed rent more than 12 years before the permanent settlement.

2. Tenures existing at the time of the decennial settlement, which have not been, or may not be, proved to be liable to increase of assessment on the grounds stated in Reg. 8, 1793, Sect. 1.

3. Land held by Khood Khast, or Kudeemee ryots having rights of occupancy at fixed rents, or at rents assessable according to fixed rules under the Regulations in force.

4. Lands held under bonâ fide leases, at fair rents, temporary or perpetual, for the erection of dwelling houses, or manufactories, or for mines, gardens, tanks, canals, places of worship, burying grounds, clearing of Jungle, or like beneficial purposes, such lands continuing to be used for the purpose specified in the leases.

5. Farms granted in good faith, at fair rents, and for specified areas by a former proprietor, for terms not exceeding twenty years, under written leases, registered within a month from their date, and approved by the Collector, who may object to such farms, if he considers that the security of the public revenue will be materially affected thereby. Reg. 12, 1841, Sect. 27.

6. Such leases, assignments, or other encumbrances with which the last proprietor or his predecessors have burdened the estate, and which in the conditions of the sale have been declared, by the local Government, binding upon the new purchaser. Reg. 12, 1841, Sect. 29.

Rights transferred to the purchaser in the districts not permanently settled.

355. In the districts not permanently settled, the purchaser acquires also the estate free from all encumbrances, which may have been imposed upon it after the time of the settlement, and is entitled to set aside all tenures, except bonâ fide leases of ground for the erection of dwelling houses, or buildings, or for offices thereunto belonging, or for gardens, tanks, canals, water courses, or the like purposes specified in the leases, so long as the lands are appropriated to such purposes, and the stipulated rent paid, yet the purchaser cannot demand any higher rate of rent from the person whose agreement may be annulled, than what

Digitized by Google

would have been justly demandable by the former Molgoozar according to the custom of the district. Reg. 12, 1841, Sect. 28.

356. When however the recorded or unrecorded proprietor purchases, or repurchases the estate, in his own name or in the name of another, the estate he acquires is subject to all the encumbrances existing at the time of the sale. Reg. 12, 1841, Sect. 30. Rights acquired under a purchase by the former proprietor.

357. Though the sale generally becomes final and conclusive on the thirtieth day, (Sect. 352), it may still be annulled afterwards. The defaulting proprietor is at liberty to appeal within 15 days after the day of sale to the Commissioner of Revenue; if he neglects to apply within that time, he cannot afterwards get the sale set aside; but if he appeals within that period and the Commissioner dismisses the complaint, he is at liberty to appeal to the civil court within one year from the date of the sale's becoming final, if he has not received any part of the purchase money. Should the sale then be annulled by the order of the Court, the purchase money is to be refunded to the purchaser by Government, together with interest at the highest rate of the current public securities. Reg. 12, 1841, Sect. 26. Annulment of the sale.

The Commissioner of Revenue may annul the sale in two instances; 1, when a complaint upon stamp paper stating circumstantially any irregularity which has taken place in conducting the sale is preferred to the Collector for transmission to him on or before the tenth day after the day of sale; or, direct to him on or before the fifteenth day; Reg. 12, 1841, Sect. 18. 2, when he has granted a postponement of the sale, for some reason or other, and his order has been received by the Collector *before* the sale, but the estate has nevertheless been sold. Ibid, Sect. 11.

The Government may annul the sale on the ground of hardship or injustice to the proprietor, or the representation of the Commissioner and the Board of Revenue, on a petition presented to the Commissioner within fifteen days from the date of sale. Ibid, Sects 18, 19. See further Sect. 352.

2. *Sale of Putnee Talooks for Arrears of Rent due to the Proprietor.*

358. Whenever there is an arrear of the annual rent of any Sale of put-

Digitized by Google

nee Talooks for arrears of rent, when to take place.

At whose request.

tenure upon which the right of selling or bringing to sale for an arrear of rent has been stipulated, on the first day of Boysack or on the first day of Kartick, the Zemindar, that is, the proprietor under direct engagements with the Government, is entitled to attach the tenure, to apply for its sale for the recovery of such arrears as may be due according to his accounts, and to cause it to be sold by public auction to the highest bidder, if the whole arrear is not paid at sunset on the day preceding the day fixed for sale in the month of Joysty, or so much of it as shall reduce the arrear, including any intermediate demand for the month of Kartick, to less than one-fourth, or a four anna proportion of the total demand, calculated from the commencement of the year to the last day of Kartick, at sunset on the day preceding the day fixed for sale in the month of Uggrohayun. Reg. 8, 1819, Sects. 7, 8.

Lakirajdars, (Const. No. 313, 5th May, 1820,) Ijardars, (Const. No. 461, 7th September, 1827), and farmers under the Court of Wards, (Const. No. 523, 4th September, 1829,) cannot attach such tenures and cause them to be sold without having first obtained a decree from the civil court for the arrears due.

Sales conducted by whom, and where.

359. Such sales are to be conducted by the Collector, Deputy Collector, or their Head Assistant, Reg. 7, 1832, Sect. 16, Cl. 1, in the Cutcherry of the Collector in whose jurisdiction the lands are situated. Reg. 8, 1819, Sect. 9.

Sales when to be held and noticed.

360. On the first day of Boysack the Zemindar is to present a petition specifying the arrears that may be due to him for the expired year, or on the first of Kartick for the arrears due to him from the beginning of the year, and apply for the sale of the tenure. The specification is then to be stuck up in some conspicuous part of the Cutcherry with a notice, that if the arrears be not paid before sunset on the day preceding the first day of Joysty; or for a sale for arrears up to Kartick, before sunset on the day preceding the first day of Uggrohayun, the tenure will be sold. Reg. 8, 1819, Sect. 9.

Should the first day of Joysty, or of Uggrohayun, fall on a Sunday or holiday, the sale will be postponed to the first Court-day; Reg. 8, 1819, Sect. 9; and should the day for presenting petitions

Digitized by Google

on the part of the Zemindars fall in the vacation, petitions will be received on the first Court-day after the vacation, and the sale take place one month after. Const. No. 329, 15th September, 1820.

361. Fifteen days notice at least is to be given by a notification containing the day of the sale and the amount of the arrears, to be fixed ; 1, in the Cutcherry of the Collector ; 2, in the Sudder Cutcherry of the Zemindar ; and 3, in the Cutcherry or in the principal town or village upon the land of the defaulter. The notice to be sent into the Mofussil is to be served by a single peon, who will bring back the receipt of the defaulter, or in the event of inability to procure this, the signatures of three substantial persons in the neighbourhood, in attestation of the notice having been brought and published at the spot. If they refuse to sign it, the peon will declare on oath in the Cutcherry of the nearest Moonsiff, or, if there be no Moonsiff, in the nearest Thannah, that he has published the notice ; and this declaration shall be signed and sealed by that officer and delivered to the peon. Reg. 8, 1819, Sect. 8, Cl. 2. Sale how to be noticed.

362. On the day of the sale, the sale is to proceed in the order in which the lots are written in the notification. The Zemindar is to produce ; 1, his statement of payments up to the day of sale ; 2, the receipt for, or certificate of the notice published in the mofussil ; and 3, in case the sale is for the arrears of the first half year, the kistbundee of the defaulter, to prove that the unpaid balance exceeds a four anna proportion up to the date of sale. The Zemindar is responsible for the correctness of these papers, the Collector only for the observance of the rules prescribed by the Regulations. Reg. 8, 1819, Sect. 10. Order of sale.

When these papers have been inspected, and the arrears and due notice of the sale ascertained and recorded, the estate is to be sold to the highest bidder, Reg. 8, 1819, Sect. 9, 14. The purchaser is immediately to deposit fifteen per cent. of the purchase money in cash, or in notes of the Bank of Bengal, or Govt. Securities, and if they be not paid within two hours after the sale, the lot is to be resold again on the same day. The remainder is Payment of the purchase amount.

W 2

Digitized by Google

to be paid by noon on the eighth day. If it be not paid within that time, the deposit is forfeited, and the lot will be resold on the following day, after proclamation has been made by beat of drum through the bazar of the Sudder station of the Zillah, at the risk of the purchaser, who will forfeit the deposit, which is to be reckond a part of the proceeds of the sale available for the benefit of the defaulter, and also to be answerable for any sum in which the proceeds of the second sale may fall short of the antecedent one, without being entitled to any surplus which might be obtained. Reg. 8, 1819, Sect. 9, Const. No. 580, 24th December, 1830.

Mode of obtaining Possession of Talooks after sale.

363. As soon as the entire amount of the purchase money shall have been paid, the sale is final. The purchaser will receive a certificate of such payment from the Collector, cause the tenure to be transferred to his name in the Cutcherry of the Zemindar, and obtain the usual umuldustuk, order of possession, on furnishing security, if required, to the extent of half the Jumma, with notice to the ryots to pay their rents to him.[1] If the Zemindar should raise objections, the Court will enforce possession by the Nazir, and issue a proclamation noticing the purchaser's rights under the purchase. In case of necessity the purchaser may apply for the assistance of the police, which is to be given. Reg. 8, 1819, Sect. 15.

[1] When the tenure is transferred by private sale, or in execution of a decree, the purchaser is, besides the purchase amount, to pay a fee to the Zemindar at the rate of two per cent, on the Jumma until it amounts to 100 Rupees, which is the maximum; but this fee is not paid when the tenure is sold for arrears of rent. Reg. 8, 1819, Sect. 5.

Rights transferred to purchasers.

364. By a sale for arrears of rent to the Zemindar, his rights in the tenure are transferred to the purchaser, who obtains the tenure free of all encumbrances, which the defaulter has not been empowered to impose by a stipulation to that effect in the written engagements under which he held the tenure. All under-leases, not made under the authority of the engagements, are therefore cancelled, except that Khood Khast ryots, or resident and hereditary cultivators, cannot be ejected, nor can bonâ fide leases, contracted for at the common rate of rent in the district be cancel-

Digitized by Google

led, so long as the tenant pays his rent regularly. Reg. 8, 1819, Sect. 11.

When re-purchased by the defaulter.

Should the defaulter however, contrary to the Law, (Reg. 8, 1819, Sect. 9,) re-purchase the tenure in a fictitious name, he acquires only the same rights, which he held before the purchase, and cannot cancel any under-tenure held under engagementa with him. Const. No. 1243, 16th August, 1839.

Sale how annulled.

365. Though the sale is final and conclusive from the moment the property is knocked down to the purchaser, provided he pays the purchase amount on the eighth day, still the sale may be afterwards annulled by a decree of the Court, either on account of any informality in conducting it, or on the ground that no arrears were due to the Zemindar. The purchaser is to be made a party to the suit, and when the Court annuls the sale, he is to be indemnified for all loss, at the charge of the Zemindar or person at whose suit the sale may have been made. Reg. 8, 1819, Sect. 14, Cl. 1.

Costs of sale.

366. Besides all charges incurred in bringing the property to sale, one per cent. of the net proceeds of the sale is to be carried to the account of Government. Reg. 8, 1819, Sect. 17, Cl. 2, 3.

Other saleable tenures can only be sold under a decree.

367. Under-tenures held under engagements similar to those executed between the Zemindar and Putneedar, and other tenures, which, under the engagement or by established usage, are transferable by sale, can only be sold on account of arrears of rent for the past year under a decree of the Court. The sale of such tenures is to be conducted in the same manner by the Collector, Deputy Collector or their Head-Assistant as above stated (Sect. 359 to 62,) with ten days notice. Reg. 17, 1793, Sect. 3; Reg. 7, 1799, Sect. 15, Cl. 7; Reg. 8, 1819, Sect. 16; Const. 8th July 1813.

3. *Sale of Personal Property for Arrears of Rent.*

Sale of personal property for arrears of rent, when to take place.

368. Whenever a dependant Talookdar, Kutkinadar, Jotedar or other under-tenant of whatever description, has fallen in arrear with any kist due under his engagement or according to local usage, whether from lands paying revenue to Government,

Digitized by Google

or from lands held exempt from public Revenue, (Const. No. 33, 21st January, 1808,) the Zemindar, Talookdar, or Proprietor, Reg. 7, 1799, Sect. 2, on serving the tenant with a written demand for the amount of the arrears accompanied by a Jumma wassil baukee, is empowered, personally or by his servants on his responsibility, immediately, or afterwards, to distrain his personal property and cause it to be sold for the recovery of the arrears, Reg. 7, 1799, Sect. 3, Reg. 5, 1812, Sect. 13 ; or, when the tenant has given surety, and the arrears have been ineffectually demanded from the defaulter, or he has absconded, to distrain and sell the personal property of the surety. Reg. 7, 1799, Sect. 3. But the looms and materials of a weaver or manufacturer, the tools of a labourer or artisan, and the ploughs and implements of husbandry cannot be distrained and sold, Reg. 17, 1793, Sect. 3, Ben. Reg. 45, 1795, Sect. 3, Ced. and Conq. Prov. Reg. 28, 1803, Sect. 3, Reg. 5, 1812, Sect. 14, until a decree has been obtained. Const. No. 962, 31st July, (26th June,) 1835. (See Sect. 339, No. 3.)

Sale conducted by whom.

369. The sale is to be conducted by the Commissioner for the sale of property distraind for arrears of rent, appointed for one or more districts by the Collector under Act 1. 1839. The Commissioner is to keep a regular and complete record of his proceedings. Ibid, Sect. 3.

Sale where to be held.

370. The sale is to be held either at the premises where the property was distrained, or at some other proper place, for instance, the Gunge, Bazar, or any other place of public resort, as near as possible to the premises, and within the limits of the Pergunnah. Reg. 17, 1793, Sect. 12 ; Reg. 7, 1799, Sect. 4.

Request how to be made.

371. The distrainer is to forward an inventory of the distrained property to the Commissioner with a written request to cause it to be publicly sold, specifying the amount due and the place where the sale is to be held. Reg. 7, 1799, Sect. 4.

Sale how to be notified.

372. On receipt of the written request, the Commissioner is, *First* to issue a notice containing, 1, a list of the property to be sold ; 2, the place, where it is to be sold ; 3, the day of sale, which shall be as early as possible after due notification, but not before

Digitized by Google

the expiration of five complete days after the attachment; 4, the time of the day, which shall be during the hours of business, when the greatest number of people may be expected to assemble. Reg. 35, 1795, Sect. 5; Reg. 7, 1799, Sect. 4.

Secondly. To fix the notice on the outer door of his house and at the place, where the sale is to be held, and to publish the sale by beat of drum on one market day at the least before the sale, and on the morning of the day of sale. Reg. 7, 1799, Sect. 4.

Thirdly. To cause the distrained property to be appraised by two competent persons according to the current value of each article. The appraisement, signed and attested by the appraisers and with the Commissioner's seal affixed to it, is to be stuck up on the outer door of the Commissioners house, and where the sale is to take place; Reg. 35, 1795, Sect. 5, and a copy of it is to be communicated to the owner of the disdrained property three days at least before the sale. Reg. 5, 1812, Sect. 18.

Fourthly. To ascertain, that the distrainer has given notice to the Salt Agent, or the native Superintendent of the Chowkey, in case the owner of the distrained property is employed in the manufacture of Salt, to enable them to satisfy the demand before the day of sale. Reg. 7, 1799, Sect. 4.

Sale when to be held and how conducted.

373. Should the defaulter not pay the arrears, with costs, prior to the day fixed for the sale, Reg. 17, 1793, Sect. 11; Ben. Reg. 45, 1795, Sect. 9; Ced. and Conq. Prov. Reg. 28, 1803, Sect. 9, or, should the demand be disputed, and the defaulter not enter into a bond with good security, binding himself to institute a suit within fifteen days, and to pay whatever sum may be adjudged to be due by him with interest at the rate of twelve per cent. and Costs, Reg. 5, 1812, Sect. 15, the sale will take place on the day fixed. The property to be sold is to be brought to the place of sale on the morning of the day of sale, or samples of it, if it consists of grain, or other products of the earth. The property is to be sold in one or more lots as the Commissiener may think advisable, to the highest bidder, beyond the appraised value, but if less is offered, the sale is to be postponed to the ensuing market day, when the property is to be actually sold, whatever price, not less than the amonnt bidden on

Digitized by Google

the first day, may be offered for it. Reg. 35, 1795, Sect. 5; Reg. 5, 1812, Sect. 19. Neither the Commissioner, nor the distrainer, the appraisers or the defaulter are allowed to purchase such property, either personally, or through any other, under forfeiture of the purchase money. Reg. 17, 1793, Sects. 24, 25; Ben. Reg. 45, 1795, Sects. 22, 23; Ced. and Conq. Prov. Reg. 28, 1803, Sect 22, 23.

Payment of purchase money.

374. The property is to be sold for ready money, and no part of it is to be carried away till paid for. Should the purchaser fail to make good the payment, the property is to be resold, and the defaulting purchaser forfeits to the distrainer ten per cent. on the amount of the price at which the property was purchased, and is to make good all loss and expenses incurred on the resale, without being entitled to any profit that might accrue. Any profit on the resale is to be carried to the credit of the defaulter. Reg. 35, 1795, Sect. 7. If the property is delivered without payment, it is delivered at the personal risk of the Commissioner, who is to make good the price, and may recover it from the purchaser by the regular course of law. Const. No. 787, 3d May, 1833.

Objections to the sale to be decided by the Court.

375. The Commissioner having no judicial authority, has no power to inquire or examine into disputed claims upon the property distrained, as for instance, when any part of it is claimed by others as their property, or as having been previously mortgaged to them; nor can he postpone the sale on account of such claims without an order from the civil court. It is his duty to sell off all the property seized by the distrainer upon his responsibility, Reg. 7, 1799, Sect. 9, leaving the parties to complain to the court, Const. No. 348, 19th April, 1822, except such property which it is not lawful to distrain for arrears of rent. See Sect. 339, No. 3, 368). The Commissioner is empowered to determine disputes regarding the expenses of attachment, and he may reject such expenses, as may appear to him unreasonable. Reg. 17, 1793, Sect. 11; Ben. Reg. 35, 1795, Sect. 5; Ced. and Conq. Prov. Reg. 28, 1803, Sect. 9.

Costs of sale.

376. The Commissioner is entitled as a renumeration for his personal trouble and for the expenses of publishing the sale and causing the property to be appraised, to deduct from the proceeds,

Digitized by Google

and charge to the account of the defaulter, such percentage, as has been fixed by his appointment, which is not to exceed ten per cent. Reg. 7, 1799, Sect. 5; Reg. 1, 1839, Sect. 2. When the defaulter pays the arrears before the sale, and no sale takes place, the Commissioner is not entitled to any commission beyond the expenses actually and necessarily incurred. Reg. 7, 1799, Sect. 5.

4. *Sale of Real and Personal Property in Execution of Decrees.*

Sale of property in execution of decrees, when to be made.

377. Whenever a decree-holder wishes to have property sold in satisfaction of a decree, he is to apply to the Court, who passed the decree, and point out the lands or other property which he requests to be sold as belonging to the person from whom the amount may be demandable. Reg. 26, 1814, Sect. 15.

1. When the property consists of lands paying revenue to Government, however small, not being orchards or gardens, and larger portions of rentfree lands, the Court is to send a copy, or translation of the decree, together with the statement of the decree-holder to the Commissioner of Revenue (Reg. 1, 1829), who will order the Collector to attach the estate, or such portion as may be necessary to satisfy the decree, and see the jumma adjusted in case any portion of the lands to be sold are assessed. Reg. 45, 1793, Sect. 2, 5; Reg. 7, 1825, Sects. 2, 4, Cl. 3; Const. No. 933, 20th February, (20th March), 1835. Should the lands have been already temporarily attached by Government, they cannot be sold in execution of decrees, but Government will in that case make an equitable arrangement for the satisfaction of the decree. Reg. 3, 1818, Sect. 10, Cl. 2, 3.

2. When the property consists of putnee or durputnee tenures, the Court is also to send the statement of the decree-holder, with a copy of the decree, to the Commissioner of Revenue, who will order the Collector to attach the tenure and see it sold. Reg. 8, 1819, Sect. 16; Const. No. 349, 26th April, 1822; No. 897, 5th September, 1834. (Sect. 367).

3. When the property consists of houses, gardens, orchards and small portions of rentfree land, or of personal property, the Court will cause it to be attached and sold by the Nazir, or an

Digitized by Google

Ameen appointed for that purpose. Reg. 7, 1825, Sect. 2; Cir. Order, 13th January, 1837, Par. 4; Cir. Order, 31st December, 1841, Sect. 2, Cl. 3. (Govt. Gaz. 1842, p. 61).

If the property is situated in another jurisdiction, the Judge is to forward the decree and statement to the Civil Judge of that district, who is to execute it in the same manner as he executes decrees of his own Court. Cir. Order, 8th May, 1840. A Moonsiff must forward the proceedings through the Judge of his own district. Cir. Order, 24th September, 1841, Cl. 2.

A Sale by the Revenue Authorities.

Sale to be held by whom, where, when.

378. The sale is to be held by the Collector or Deputy Collector in the Cutcherry at the Sudder station of the district in which the estate is situated (Sects. 346, 347), as soon as practicable after the receipt of the Court's perwannah. Reg. 45, 1793, Sects. 3, 4; Ben. Reg. 20, 1795, Sect. 3; Ced. and Conq. Prov. Reg. 26, 1803, Sects. 17, 18.

Sale, how to be noticed.

379. One month's notice is to be given by a notification to be fixed, 1, in the Collector's Court; 2, in the Court of the Judge 3, in the principal town or village in the lands to be sold; and 4 in the office of the Board of Revenue. Ten day's notice only is required for sales of under-tenures. (Sect. 367).

The notification is to contain, 1, the jumma at which the lands, or the several lots of them, will be disposed of; 2, the place, the date, and the hour of sale; 3, the proportion of revenue payable for the current year, which will fall upon the purchaser, or if the exact proportion cannot be ascertained, the rules by which the amount is to be adjusted, by the sale of shikmee, or dependant talooks; the rent payable to the Zemindar need not be stated, when it is disputed. Const. No. 1194, 28th December, 1838. All the conditions of the sale must be fixed in the sale room three days before the day of sale.

The purchaser is not responsible for any arrears of revenue prior to the year in which the sale is held, unless it be otherwise stipulated for in the conditions. Reg. 45, 1793, Sect. 15; Ben. Reg. 20, 1795, Sect. 15. It is a condition of the sale of a share in a joint undivided estate, that the purchaser succeeds

Digitized by Google

to all the rights and liabilities of the former proprietor, and that the Government claim against the Mehal is in no way affected by the sale. Cir. Order, 15th October, 1841 ; Ben. Reg. 20, 1795, Sect. 12 ; Ced. and Conq. Prov. Reg. 45, 1793, Sect. 12 ; Reg. 26, 1803, Sect. 16.

Objections to the sale to be decided by the Court.

380. The Collector has no power to inquire or examine into claims made upon the property by mortgagees, cosharers, or others, or into other objections which may be offered to the sale, but when claims or objections are made, he is to forward them, with whatever information he is able to furnish from his records, to the judge who ordered the sale for his decision. If no order is received to the contrary, the Collector has no power to postpone the sale, but is to sell the property on the day fixed. Reg. 7, 1825, Sect. 4, Cl. 4 ; Cir. Order, 4th September, 1840. The existence however of such claims or objections is to be made known to the bidders, and entered in the Robucarree. Cir. Order, 4th September, 1840, Para. 3.

In case the pooperty directed to be sold should be entered in the Collector's records in the name of any person other than his against whom the execution of the decree was issued out, the Collector is bound to sell it, if no claim is preferred ; and if a claim is made, to refer the same to the Judge. Const. No. 648, 22nd July, 1831.

Mode of sale, and payment of sale amount.

381. On the day fixed for sale, the lands are to be sold to the highest bidder in conformity with the conditions of the sale. The purchaser is immediately to deposit five per cent. on the amount of his bid, and to pay the remainder agreeably to the conditions. If he omits, or refuses to pay the deposit, the property will be resold, and that sum, as well as any deficiency, and the expenses arising from the resale, will be levied from him by the process prescribed for enforcing decrees, in case he does not pay after a written demand has been served upon him through the Collector. If the purchaser omits to discharge the entire amount of the purchase money by the stipulated day, the deposit will be forfeited to Government, and the lot resold at his expense. He will have to make good all deficiencies arising from the second sale, and he forfeits all profits, which will be carried to the credit of the proprietor.

X 2

Digitized by Google

Reg. 45, 1793, Sect. 13, 14 ; Ben. Reg. 20, 1795, Sect. 13, 14. If the decree holder purchases the property, he may of course file his receipt in lieu of payment, if there be no other legal claims on the proceeds of sale. Cir. Order, 18th January, 1839.

Mode of obtaining possession of the property.

382. As soon as the whole purchase money has been paid, the sale is final ; the Collector will grant a certificate, and cause the entries of the transfer to be made in the public registers. Reg. 45, 1793, Sect. 18 ; Ben. Reg. 20, 1795, Sect. 18. Should the possessor of the property make objections to give over possession to the purchaser, the Court will enforce possession. (See Sect. 363.) The purchaser obtains by the purchase nothing beyond the rights and interest of the individual whose property is sold. Reg. 7, 1825, Sect. 3, Cl. 7. If therefore the property has been previously mortgaged, the purchaser will obtain the property subject to this encumbrance. Cir. Order, 4th September, 1840.

Rights transferred to the purchaser.

Annulment of the sale.

383. Though the sale is final from the moment the property is knocked down to the highest hidder, on his fulfilling the conditions of the sale, yet a sale may be annulled by the Court which ordered it, either on account of any material irregularity in the sale, or on account of the rights of a third party, for instance, a mortgager co-sharer, &c. The purchaser is then to receive back his purchase money on restoring the prrperty delivered over to him, with or without interest, as may appear proper in each instance. A complaint to set the sale aside on account of irregularity must be brought within a month after the sale. Reg. 7, 1825, Sect. 3, Cl. 3, 4, Sect. 5, Cl. 1.

Cost of sale.

384. As the sale of the property is a part of the execution of the decree, no separate costs are charged for conducting the sale beyond the actual expenses attending the attachment, and the sale. Reg. 45, 1793, Sect. 6. Ben. Reg. 20, 1795, Sect. 6. Ced. and Conq. Prov. Reg. 26, 1803, Sect. 20.

B. Sale by the Civil Authorities.

Sale conducted by whom.

385. When the property in execution of a decree is to be sold by the Civil Authorities (Sect. 377, No. 3,) the Court will either attach and sell it by the Nazir, (Reg. 7, 1825, Sect. 3,) or, by an

Digitized by Google

Ameen appointed by Sunnud for a certain district for such purposes, Cir. Order, 13th January, (10th February,) 1837, Par. 4, Cl. 2—4, or, by an officer of the Court especially appointed. Ibid, Par. 4, Cl. 8.

386. The said officer is by a general order from the Court empowered to attach and sell houses, gardens, orchards, small portions of lackeraj lands, and personal property, in person; not on any account by deputy. Cir. Order, 13th January, (10th February,) 1837, Para. 4, Cl. 6; Reg. 7, 1825, Sect. 2, Cl. 3; Cir. Order, 7th February, 1840. In general all property which is saleable (Sect. 336 to 339,) may be sold in execution of a decree. The tools and materials of tradesmen, labourers, or artisans, and implements of husbandry, &c., may be sold (Sect. 339, No. 3); as well as bonds and claims against a third party, Const. No. 1248, 3rd January, 1840, (6th September, 1839); and salary, which is due, Const. No. 827, 9th August, 1833; but not the salary of any military officer, Const. No. 902, 24th October, (26th September,) 1834, or pensions granted by Government. Const. No. 788, 3d May, 1833. Crops grown on lands allotted to village Chowkeedars for their maintenance, may be sold. Const. No. 1212, 12th July, (19th April,) 1839. A house must be sold as it stands; it is not allowed to be taken to pieces and sold separately, Const. No. 1227, 2nd August, 1839, Par. 1. Trees are to be sold as they stand, and are not to be cut down till after the sale. Ibid, Par. 4. What can be sold.

387. Thirty day's notice of the attachment and intended sale is to be given by a notification by the Court (not by the Ameen, Cir. Order, 31st December, 1841, Par. 8,) to be fixed, 1, in the Cutcherry of the Judge who ordered the sale; 2, of the Collector; 3, of the local Moonsiff; 4, at some conspicuous place within the village or town on the spot where the property was attached. The proclamation is to be made by beat of drum (on the day of proclamation and on the day of sale) on the spot (in the town, or village?) where the property is attached. The process of attachment and sale may be issued successively, or simultaneously, but no sale is to take place till thirty days after the first notification. Reg. 7, 1825, Sect. 2, 3. Sale how to be noticed.

Digitized by Google

The conditions of the sale must be fiixed up in the sale room three days before the day of the sale ; Reg. 45, 1793, Sect. 12. One of them is to be, that nothing is guaranteed to the purchaser in the lands, or other property sold, beyond the rights and interests therein of the individuals answerable for the amount of the decree. Reg. 7, 1825, Sect. 3, Cl. 7.

Objections to the sale to be decided by the Court.

388. The Nazir, or Ameen, has of course no power to examine into claims, or objections to the sale, Cir. Order, 31st December, 1841, Para. 8 ; he must refer the claimants to the Court which ordered the sale ; nor is he empowered to stay the sale without an order from the Court. (Sect. 380.) On the day of sale, he is to sell the property to the highest bidder in one or more lots, as may be most profitable to the parties. On a purchase of houses or lands, the purchaser is immediately to deposit five per cent. on the amount of his bid, and pay the remainder according to the conditions. See Sect. 381 ; personal property is to be sold for ready money only, and not to be delivered till paid for. Const. No. 787, 3rd May, 1833, (Sect. 374). If the purchaser refuse to pay the purchase money and take possession of the property, it will be resold, and all losses recovered from the first purchaser under the process prescribed for execution of decrees. Const. No. 554, 28th May, 1830. Should the purchaser, having paid the purchase money refuse to take possession within a reasonable time, the property, having been tendered to him, stands at his own risk. Const. No. 532, 4th December, 1829, Para 2. Should the decree-holder purchase the property, he may file his receipt in lieu of payment, if there be no other legal claims on the proceeds of sale. Cir Order, 18th January 1839.

Payment of sale amount.

Annulment of the sale.

389. The sale of this kind of landed property may be annulled upon the same grounds, and with the same effect as sales of assessed lands. See Sect. 383. Sales of persoual property are not annulled, but claimants may recover full compensation from the person who caused the sale. See Reg. 7, 1799, Sect. 9.

Costs of sale.

390. When the Nazir is employed in conducting the sale, no costs are charged for attaching the property and conducting the sale besides actual expenses, as these duties are performed by him in the discharge of his ordinary functions ; Const. No. 509, 29th

Digitized by Google

May, 1829, but when, on account of the distant situation of the porperty, it is necessary to dispatch an Ameen or other officer for that purpose, such officer is entitled to a commission of one anna in the Rupee on the proceeds of sale. Reg. 23, 1814, Sect. 51; Cir. Order, 31st December, 1841. (Govt. Gaz. 1842, p. 64). This commission includes remuneration for his personal trouble, as well as the expense of publishing the sale. See Reg. 7, 1799, Sect. 5; Cir Order, 31st December, 1841, Para. 12, and of giving possession of the property. If, however, the delivery should be unduly resisted, and the Ameen for that reason be delayed, he is entitled to a further reasonable compensation, to be fixed by the Court according to circumstances. Ibid. 4, 13.

When no sale takes place.

If an Ameen has been appointed to attach and sell property, and either no property after due search is forthcoming, or no sale actually takes place, because the parties compromise the matter, or the debt is paid before the sale, or for some other cause, the Ameen is entitled to a daily remuneration of 15 annas, viz. 12 annas for himself, and 3 annas for peadas. If the sale be stopped before his departure from his abode, he is to receive one day's pay; if afterwards, he will receive pay for as many days as he has been actually employed, yet the payment is never to exceed the amount he would have obtained if the sale had been effected. Cir. Order, 31st December, 1841, Para. 10, 11. Should the Ameen himself delay the completion of his duty, he will not of course be entitled to any payment for such time. Ibid, Sect. 7.

Costs to be prepaid.

To secure the remuneration of the Ameen, the decree-holder is bound to deposit the probable costs when he applies for the attachment and sale. The costs are to be calculated according to the distance of the place where the property is situated, at ten miles per day; and half of it is to be paid to the Ameen on starting. If no sale takes place, the Ameen will be paid according to the above rules; and the remainder returned to the decree-holder, who may arrange for reimbursement with the other party; if the property be sold, the amount will be credited the decree-holder in the commission. Cir. Order, 31st December, 1841, Para. 10; Cir. Order, 21st August, 1843, (Govt. Gaz. p. 407.) Should the sale

be reversed for any cause not involving the conduct of the Ameen, he is still entitled to the commission he has received, but the Court will determine by whom these expenses are to be paid. Cir. Order, 31st December, 1841, Sect. 12.

7. On the Obligations of the Seller.

Obligations of the seller.

391. It is the duty of the seller distinctly to state what he is going to sell, and upon what conditions; whenever therefore the terms are dubious,[1] they are always to be interpreted against him. His duties consist in the delivery, and the warranty of the thing.

[1] Uncertainty invalidates a gift under the Mahomedan Law, (Sect. 274,) but not a sale, if the uncertainty is removed prior to the actual fulfilment of the contract. Hedaya, vol. ii, p. 450. Princ. Mahomedan Law, p. 166.

A. Delivery.

Delivery how to be made.

392. The delivery of immoveable property is performed by the delivery of the title deeds, and of moveable property by the actual delivery of the thing, or by the consent of the parties alone, if the purchaser already has possession of it in another capacity, as borrower, hirer, &c. Rights are transferred by the delivery of the title deeds and a written conveyance, or by the use which the purchaser is allowed to make of the right, with the consent of the seller.

Delivery where to be made.

393. The delivery of the thing must be made at the place specified in the contract; if no place has been fixed, the delivery must be made at the seller's abode, when the purchaser demands delivery; and at the purchaser's abode, when the seller offers delivery, but if the subject of the engagement is a specific and individual thing, it is to be delivered at the place in which it was at the time of the agreement.

Colebrooke, Contracts and Obligations, sects. 231, 235. In a sillim sale—a sale for instant payment and future delivery—Aboo Huneefah holds, that the sale is invalid, if the place of delivery has not been stipulated; but the two disciples contend, that the contract is not thereby invalidated, and that the delivery must be made at the place, where the contract was concluded. Hedaya, vol. ii. p. 523.

Delivery, when to be made.

394. The delivery of the thing must be made at the time stipulated; if no time has been fixed, the sale is understood to be for

Digitized by Google

immediate delivery admitting such delay only as the nature of the thing requires.[1]

It is lawful under the Mahomedan Law to stipulate for delivery *and* payment at a future time; for instance, that three months hence B. will deliver to A. 100 Maunds of rice at 12 annas per Maund, and that A. on receipt of the same will pay the price stipulated.[2] A sale of non extant things is generally invalid, but it is lawful on account of a saying of the prophet,[3] to stipulate for delivery *and instant* payment at a future time of things not actually extant at the time, when their quantity and quality are distinctly ascertainable and ascertained (called a sillim sale); for instance, if B. sells A. 100 Maunds of a certain kind of rice, of the best, middle, or lowest quality, at 12 annas the Maund for instant payment to be delivered at a certain place, (Sect. 393), three months hence; but it is not lawful to stipulate for a distant delivery of things in the seller's possession, sold for immediate payment.[4] The reason is that there is no necessity for granting such a postponement, and that a mixture of contracts would thereby be created.

1 Colebrooke, Contract and Obligation, p. 220.
2 Hedaya, vol. ii. p. 450.
3 Hedaya, vol. ii. p. 516.
4 Hedaya, vol. ii p. 448.

Seller not bound to deliver until payment, unless otherwise stipulated.

395 The seller is not bound to deliver the thing to the purchaser before actual payment,[1] unless time fore payment has been granted; therefore, if a thing was sold unconditionally and delivered to the purchaser, and the purchaser refused to make instant payment, and insisted that the thing was bought upon credit, the purchaser is entitled to take back the thing, as no sale has actually taken place; but if the seller allows the purchaser to remove the thing, so that it is actually out of the possession of the seller, as for instance, if he allows *him* to carry it to his house on condition that immediate payment shall be made there, then a delay of payment, however short, has actually been granted to the purchaser; the sale is complete, and if the purchaser breaks the contract by delaying payment, the seller cannot reclaim his articles, he can merely recover the price. If the seller sends the things

Digitized by Google

with his servant to deliver them in the house of the purchaser on receiving the price, and the purchaser should *there* take possession of the article and refuse payment, the servant, who stands in the place of his master, can *there* take back the article, because it has not yet been legally out of his possession.

Seller not bound to delivery in case of purchaser's insolvency afterwards.

In case the seller should have promised delivery on condition of future payment, and some great change should take place in the pecuniary situation of the purchaser, as bankruptcy or the like, the seller is not bound to deliver the article till payment is made, or sufficient security is given, because the respite which has been stipulated for must be considered to have been granted in consideration of his apparent pecuniary circumstances at the time the agreement was made.[2] That the seller considered the purchaser more solvent when he made the agreement, than he afterwards sees cause to believe, cannot liberate him from the fulfilment of his engagement, if no positive alteration has taken place in the purchaser's pecuniary state.

1 Hedaya, vol. ii. p. 379; vol. iii. p. 575. Digest, book iii. ch. 3, sect. 20.

2 Colebrooke, Contracts and Obligations, sect. 224.

The delivery how to be made.

396. The thing is to be delivered in the state it was in at the time of the sale; that is to say, if the sale was concluded in the present tense, in the state in which it was at the time of the engagement; and if it was concluded in the future tense, in the state it was in at that future term.[1] The fruits of the thing from that time belong to the purchaser.[2]

In a sale of land, or of a house, all fixtures are included, though they may not have been specified by the seller. Fixtures comprize all such things, as cannot be removed without actually deteriorating the thing. In the sale of "a house," the foundation and superstructure, the windows and doors, are necessarily included, but not loose shades or huts, which may be removed without injuring the house. In a sale "of land," the trees on it are included, because they are connected with the land in the nature of fixtures, and there was no intention of cutting them down, but neither the corn growing on the lands, nor the fruit upon the trees, follow the land, as they were intended to be cut down and gathered.[3] The seller must however remove them before delivery.

Digitized by Google

In a sale of lands, or of a house, the lands or the house is generally sold with its rights and appurtenances. *Rights* are such things as are essentially necessary to the use of the subject of the sale, as a road for passing to and from the ground ; *appurtenances* are things from which an advantage is derived, but in a subordinate degree, as a well, a drain, a cook-room. As these do not constitute any part of the house, or the ground, but are merely dependant on it, and has the house or the land may be sold without them, they do not follow the sale of the land or the house, unless generally or specially stipulated for.[4]

In a sale of "Julker" only the profit arising from the water, whether by fishing or otherwise, belongs to the purchaser, not the lands it covers; but in the sale of a "Jheel" the lands is included.[5] In a sale of "Bunkur" only the profit arising from the trees of spontaneous growth, whether great or small, is sold, but not the land. The owner of the land may cut down any tree to clear the lands for cultivation. If he should afterwards be unable to cultivate the lands, he is responsible for the loss to the owner of the Bunkur, to whom the timber of such felled trees belongs.[6]

[1] Nareda, Digest, Book iii. ch. 3, sect. 27. "Should the thing sold be injured, or burned, or carried away, after the time when it ought to have been delivered, the loss shall fall on the vender, who delivered it not, when he ought." Yajnyawalcya, ibid, sect. 28. "Should a commodity sold, but not delivered on demand with tender of payment, be injured by the act of God, or of the king, the loss shall fall on the vender." See also ibid, sects. 18, 19, 21, 22. Colebrooke, Contracts and Obligations, sect. 163.

[2] Hedaya, vol. ii. p. 375.

[3] Hedaya, vol. ii. p. 372, 378 ; vol. iii. p. 147.

[4] Hedaya, vol. ii. p. 502.

[5] Lukhee Dassy *versus* Khatima Bebee, S. D. A. Rep. vol. ii. p. 51.

[6] Byjonauth Mujmoodahr *versus* Deen Dyal Gooput. S. D. A. Rep. vol. ii. p. 105.

Delivery of things sold by weight or measurement.

397. If the thing is sold according to quantity, and the actual quantity falls short, the purchaser has the option of annulling the contract entirely, or of paying in proportion to the quantity actually received.[1] For instance, if A. sells B. a heap of grain, stating it to contain 100 Maunds, for 75 Rupees, and this heap of grain be found by measure to contain only 90 Maunds, the purchaser may either annul the contract, as it may be requisite to him to have ex-

actly 100 Maunds ; or he may pay him for the 90 Maunds at a proportional rate, viz., 12 annas per Maund. Should the heap contain 110 Maunds, the surplus belongs to the seller, and the purchaser is not bound to take the whole.

Should the quantity have been sold on the condition "less or more" the deficit, as well as the surplus, falls on the purchaser.

[1] Hedaya, vol. ii. p. 367.

Delivery of specific things.

398. If the thing sold is a specific thing, and the quantity is added as a description of the thing, and it should fall short, the purchaser has the option of annulling the contract, or taking the defective thing at the stipulated price, but he is not entitled to any deduction;[1] for instance, if A. sell a piece of cloth to B. for 10 Rupees, stating it to contain 40 yards in length and a yard and a half in breath, and the cloth is found to be deficient, either in length, or in breath, the purchaser can make no deduction, because the contract related to a *piece* of a certain description, and no part of the price is supposed to the length, or the bredth; but had the agreement been for the yard, it would have fallen under the former rule. (Sect. 397.)

This rule is also applicable to the sale of ground stated to contain so many Biggahs, Mehals, &c. If the ground in this case be found less, the purchaser may annul the contract, if he will not pay the stipulated price ; but he cannot demand a deduction,[2] because he agreed to purchase "the ground," "the estate," "the Zemindary" or "the Mehal;" and the quantity mentioned is only a description of it, of its length and bredth ; if the ground be found to contain more than was stated, the excess becomes the property of the purchaser without any addition to the price, and the seller has no option. But in case a person sells, say, 50 Biggahs of Paddy ground, then the "50 Biggahs" becomes the substance, and "Paddy ground" the description, and the first rule must be applied.

[1] Hedaya, vol. ii. p. 369.

[2] Hedaya vol. ii. 368. Ramdoolal Misser *versus* Modun Mohun Bottarcharjee, S. D. A. Rep. vol. ii. p. 143. A tenure free of assessment was erroneously included in an estate sold by auction; the purchaser was declared entitled to relinquish his bargain, but not to any deduction in the assessment. See

Digitized by Google

also Doorgapersad Bose *versus* the Collector of the 24-Pergunnahs, ibid, vol. i. p. 155. Collector of Dinajpore *versus* Gourch and Surmo. Ibid, vol. i. p. 176.

399. As it is the duty of the seller to deliver the thing to the purchaser, all expenses necessary for the delivery must be defrayed by him, unless otherwise contracted. If the things are to be delivered at the purchaser's abode, the charges for conveyance must be borne by the seller, and if they are to be delivered by weight or measure, the charges for weighing or measuring must be paid by him.[1] When property is sold by a deed, the charges for stamp-paper and for making out the conveyance fall on the seller; but the charges for the registry of the conveyance, or for the transfer in the records of the Collector, must be borne by the purchaser, as these acts are unconnected with the delivery, and necessary only to secure his rights to the purchaser.

Expenses necessary for delivery fall on the seller.

1 Hedaya, vol. ii. p. 378.

B. Warranty.

400. The warranty which is due by the seller to the purchaser has two objects: 1, the quiet possession of the thing sold; 2, a guarantee against the secret faults or vices of the thing.

In what warranty consists.

The parties can, by special stipulations, augment or diminish the warranty, as well as the effect thereof, and also stipulate that there shall be no warranty at all;[1] in such cases the terms of the contract must be followed; but if the sale has been made without any special stipulation, the seller is bound by the above warranty, (Sect. 398) and even if non-warranty has been stipulated, the seller is responsible for all personal acts. Thus, if a person gilds a ring and sells it as a golden ring, on condition that he will not warrant its being gold, still he is bound to refund the price, as it was a fraudulent act.

Parties can augment or diminish warranty.

1 Hedaya, vol. ii. p. 427.

401. The responsibility of the seller for secret faults or vices extends to all those faults, which make the thing unfit for the use for which it is designed,[1] or which impairs its use to such a degree that the purchaser, in case he had known its faults, would either not have purchased it at all, or only at a much lower price.[2] The seller is responsible for such faults, even if they were un-

What are considered secret faults or vices.

Digitized by Google

known to himself at the time of the sale;[3] but the faults must be secret; if they are visible,[4] and might easily have been detected either by purchasers in general, or by the individual purchaser in particular, according to the information or knowledge he was possessed of, the seller is not responsible, if there was no fraud on his part.

1 For instance, if a person purchase a horse described as a carriage horse, and the horse will not draw a carriage. Hedaya, vol. ii. p. 408. Menu, book viii. sect. 203.

2 To ascertain this, it will often be necessary to consult experienced persons. Hedaya, vol. ii. p. 409.

3 Hedaya, vol. ii. p. 406. According to the Hindu Law, the thing can in this case only be returned within the time allowed for inspection. (Sect. 329, note 1.) Digest, book iii. ch. 3, sect. 15, 26.

4 "A seller ought at first to inspect the commodity and ascertain what is good or bad in it, and what after such inspection he has agreed to buy, he shall not return to the seller, *unless* it had a concealed blemish." Digest, book iii. ch. 3, sect. 10.

Effect of secret faults.

402. Whenever secret faults are detected, however long after the date of sale, the purchaser is entitled to return the thing and recover the price;[1] but he is not entitled to retain the article and exact a compensation for the defect, because no part of the price is opposed to the *quality* of the article.[2] Of articles bought by measure or weight the defective part only can be returned, because the price is here opposed to each unity of measure or weight, each of which may be considered a separate article.[3] If it be disputed whether the defect existed before the sale or not, it must, in the absence of sufficient proof, be decided by the oath of the seller.[4]

1 Hedaya, vol. ii. p. 406. Menu, book viii. sect. 203. In case the fault was unknown to the seller, he can, according to the Hindu Law, only return the thing within the time allowed for inspection. (Sect. 329, Note 1.) Digest, book iii. ch. 3, sect. 15, 26.

2 Hedaya, vol. ii. p. 406.

3 Hedaya, vol. ii. p. 422.

4 Hedaya, vol. ii. p. 418.

When known to the seller.

403. Should the secret vices have been known to the seller, he is besides restitution of the price to pay interest, damages and all loses caused to the purchaser by his deceit;[1] but if they were unknown to him, he is only bound to refund the price and other costs of the sale.

Digitized by Google

1 According to the Hindu Law, the seller is even liable to be fined, see Digest, book iii. ch. 3, sect. 32. Yajnyawalcya: "if a man sell to one what had already been sold by him to another, or a blemished commodity as unblemished, the fine shall be double the price of the thing." Nareda, Ibid, sects, 30, 33. Vrihaspati, Ibid, sect. 31.

404. In case the faulty article has been further deteriorated in the purchaser's possession, *or* the return of the thing has been made impossible by any act of the purchaser, as, by cutting up a piece of cloth, or by mixing the inferior article with other articles, the purchaser is entitled to compensation corresponding with his loss, which in doubtful and disputed cases must be fixed by experienced arbitrators.

When the thing cannot be returned, on account of an act of the purchaser.

Hedaya, vol. ii. p. 410. Princ. Mahomedan Law, p. 45.

405. In case the thing should have perished in consequence of its secret faults, the loss falls upon the seller, who is to refund the purchase money; but if the thing should have perished by an accident, which might have happened whether the thing had had any blemishes or not, the loss falls on the purchaser.

Or from its having perished.

406. The right of the purchaser to recover the price or damages for secret faults, ceases: 1st, when he makes use of the article after being aware of the fault, because this involves a tacit consent to keep the thing as it is; 2ndly, when he attempts to remove the defect, as for instance, by applying medicines to a sick horse, since this also involves consent;[1] 3rdly, when he sells the thing to another person, for he cannot then return the article; but if in this case the defective thing is returned to him on account of the fault, his right revives.[2]

When warranty of faults ceases.

1 Hedaya, vol. ii. p. 423.

2 Hedaya, vol. ii. p. 416.

8. *On the Obligations of the Purchaser.*

407. The obligation of the purchaser consists in the payment of the price on the day and place stipulated. If it has not been stipulated when or where the payment is to take place, payment must be made at the time and place, where the seller offers delivery of the article.

Obligations of the purchaser.

Payment of price.

408. Should the purchaser not pay the price at the time stipulated, or, when the time has not been fixed, at the time deli-

Effect of non-payment.

Digitized by Google

very is offered, the seller may either cancel the sale, refuse to deliver the thing, and sell it to another, or he may deliver the thing, if he has not already done so, and giving notice to the purchaser, that the thing is standing at his account and risk, demand and inforce payment.

An order of Court sometimes necessary to dissolve the contract.

409. When the purchaser has obtained possession, or when a regular deed has been executed and registered, and the seller chooses to have the sale cancelled, it must be done by an order of the Court. If the purchaser should then offer payment and damages, the seller is not bound to receive it, as the purchaser, by the non-fulfilment of the contract on his part, has forfeited all his rights; and if the seller insists on having the sale cancelled, and the thing returned, the Court may inflict a daily fine till the thing is returned.

When payment may be legally withheld.

When the seller chooses to inforce payment, the purchaser is bound to pay, besides the purchase money, legal interest from the time the payment ought to have taken place in conformity with the contract, until actual payment; yet, if the purchaser should be threatened, or have good reasons to expect to be sued by some party claiming a right or interest in the property, he is entitled to refuse payment, although he has received the property, until the seller has removed this obstacle, or secured him against its consequences,[1] because the seller warrants quiet possession unless otherwise stipulated (Sect. 400). The purchaser will not in this case be liable to pay interest, but the seller in order to have his interest secured, may demand, that the purchaser shall deposit the purchase money in the Court.

[1] See Reg. 20, 1841, Sect. 1, that the debtor is entitled to refuse payment until the claimant's title is ascertained.

8. *On the Annulment of a Sale.*

Special causes for annulling a sale.

410. Besides the general causes of annulling a contract, an auction sale may be annulled for special reasons, and a private sale may be annulled on account of another person's right of preemption.

When auction sales may be annulled.

411. All auction sales may be annulled on account of any material irregularity in conducting the sale by the Commissioner of

Digitized by Google

Revenue in case the sale has taken place for arrears of Revenue, Reg. 12, 1841, Sect. 18; by the local Court, in case the sale has taken place, for arrears of rent, Cons. No. 348, 19th April, 1822, and by the Court which ordered the sale, if the sale has taken place in execution of a decree, Reg. 7, 1825, Sect. 3, Cl. 3. The complaint must in the first case be preferred to the Commissioner within fifteen days from the date of sale, Reg. 12, 1841, Sect. 18, and an appeal from his order to the Civil Court must be preferred within one year from the date when the sale became final; ibid, Sect. 25. In the last case the complaint must be made within one month to the Court ordering the sale, which may annul it summarily, whether the sale was conducted by a judicial or by a revenue officer. Reg. 7, 1825, Sect. 3, Cl. 3; Sect. 5, Cl. 1.

An auction sale for arrears of revenue may further be annulled if the Commissioner of Revenue had granted a postponement of it, and his order had been received by the Collector before the sale, but had not been attended to; Reg. 12, 1841, Sect. 11; and by the Government on the ground of hardship or injustice to the defaulter; but in both cases the complaint or petition must be preferred within fifteen days after the day of sale. Ibid, 18.

An auction sale of an under tenure for arrears of rent may also be cancelled on account of no arrears being due by the tenant, and this complaint can be preferred at any future time. Reg. 8, 1819, Sect. 14, Cl. 1.

No auction sale can be annulled on the ground, that the price obtained was inadequate. See Cons. 829, 18th October, (20th September,) 1833.

A private sale may be annulled on account of the right of pre-emption.

412. A private sale may be annulled on account of right of pre-emption (Shaffa), which may originate from a contract, or from the law, or from local customs. This right may be reserved in a contract for any length of time, but as contracts only raise obligations between the parties contracting, a sale to a party unacquainted with such special stipulation is valid, and the party who had reserved the right to purchase the thing in case the other party should sell it, can only recover damages from him for breach of contract.[1] Under the Mahomedan Law, pre-emption should be stipulated for under a separate deed. (Sect. 332.)

Digitized by Google

1 Yet see case, Rajendra Narayan Odhikaree *versus* Sayud Abdul Hakim, where the Sudder Court seems to be of the opinion, that such a stipulation is valid against the purchaser. S. D. A. Rep. vol. v. p. 312.

Right of pre-emption under the Mahomedan Law refers only to real property.

413. The right of pre-emption under ths Mahomedan Law refers only to real property, lands or houses,[1] and belongs 1, to a sharer in the property of the ground, or land sold; 2, to a partner in the rights and appurtenances of the land, or house; such as the right to water and to private roads; 3, to a neighbour.

A sharer in the property has preference over one who is only a sharer in the rights and appurtenances of the lands; and he again over one who is only a neighbour; several individuals in the same class have equal rights; each individual takes one share, without regard to the extent of their several properties. If some of the sharers happen to be absent, the right of pre-emption belongs to those who are present, because it is uncertain whether those who are absent are inclined to make use of their right; but when the absent sharers afterwards appear and claim their share, they are entitled to it.[2]

1 Hedaya, vol. iii. p. 591.

2 Hedaya, vol. iii. p. 562 to 567. Princ. Mahomedan Law, p. 192.

The right begins first after the sale;—duties of seller and claimant.

414. The right of pre-emption commences after the sale, or rather, when the proprietor has declared his willingness to part with the property.[1] It is then the duty of the seller to inform the sharers, or the neighbours. If he does not inform them, they are entitled to make use of their right, as soon as it becomes known to them that the property is sold.[2] It is the duty of the person claiming the right, to declare his intention the moment he is informed of the transaction, and to give his declaration in the presence of witnesses. If he make any delay in declaring his intention, he looses his right, partly because the right is of a feeble nature, and partly because there is no necessity for consideration, as he ought to be well acquainted with the value of the property, and his ability to purchase it.[3]

1 A refusal to make use of the right previous to the actual sale of the property has no effect, as the cause of pre-emption, viz., objections to the particular purchaser, does not then exist. Sakina Khahun *versus* Gour Sunkur Shem, S. D. A. Rep. vol. v. p. 299.

2 Omed Raj. *versus* Nakched Raj. S. D. A. Rep. vol. v. p. 68.

3 Hedaya, vol. iii. p. 568, 569.

Digitized by Google

415. When the claimant has declared his intention to take the property, he is to take it upon the same terms as the person who is willing to purchase it, or actually has purchased it. If the price or the conditions should be disputed, for instance, if it should be alleged, that the price has fraudulently been stated higher than that which had actually been agreed upon, the purchaser's statement upon oath is to be believed. When the property was sold for a price payable at a distant period, the claimant may either wait until that period is expired, and then take the property for the same price; or, he may take it immediately on paying the price; but he cannot claim any respite for payment which had not been given to the purchaser.[1]

Claimant must take the property upon the same terms as the purchaser.

Should the seller, or the purchaser, object to the claimant's right, the claim must be preferred in the Court *within a month*,[2] because if the claimant could delay the litigation as long as he pleased, it would be very vexatious to the purchaser, who would be prevented for an indefinite time, from enjoying the property under the apprehension of being depirved of it by the claim of this right of preemption; and the delay on the part of the claimant is a presumptive proof of his disinclination to use his right.

Claimant must bring his complaint into the Court within a month.

The claimant is not obliged to deposit the price into the Court on preferring his claim. It is sufficient that he pays it when his right has been acknowledgd,[3] or when the Court may think proper;[4] but if he does not pay it at that time, the right is forfeited. Even when he has obtained a decree in his favour, he cannot demand the delivery of the property until actual payment.

But is not required to deposit the price in the Court.

[1] Hedaya, vol. iii. p. 577, 583.

[2] Hedaya, vol. iii. p. 572. Princ. Mahomedan Law, p. 48, note, 184. S. D. A. Rep. vol. v. p. 69. Ziffer and Mahomed contend, on the reasons stated, that the claim must be preferred within a month; but Aboo Huneefa is of opinion that the claim may be preferred at any subsequent time.

[3] Hedaya, vol. iii. p. 575.

[4] Golam Nubby Chowdhry *versus* Gour Kissor Raj. S. D. A. Rep. vol. i. p. 350.

[5] Hedaya, vol. iii. p. 575.

416. Whenever the immediate purchaser has made any improvements in the property, the claimant by right of pre-emption must either pay their value, or cause the augmentations to be re-

When the property had been improved or deteriorated.

Digitized by Google

moved. In case the property has been deteriorated by the purchaser, the claimant is entitled to a proportional deduction in the price; but when the deterioration has not been caused by the purchaser, the claimant must either pay the whole price, or resign his claim.

Hedaya, vol. iii. p. 586. Princ. Mahomedan Law, p. 48.

When the right of pre-emption ceases.

417. The right of pre-emption ceases when the party entitled relinquishes his right, expressly, or tacitly, by neglecting to demand it, or to prosecute the claim in due time. A father, or a guardian, may renounce the right on behalf of an infant ward.[1] The right is not extinguished, when the claimant has relinquished it upon mis-information of the price, or of the purchaser, (as he may not wish to have *one* person for his neighbour, though he may have no objection to another,) or of the thing which was to be sold, as for instance, if he had been informed that one half was to be sold, and it afterwards appeared that the whole was sold. According to Zahir Rawayat, if the case be reversed, that is to say, if he first learns that the whole was to be sold, and afterwards, that only the half is sold, his right is extinguished, because his resignation of the whole, comprehends his resignation of a part.[2]

The right cannot be renounced for a compensation.

The party entitled to pre-emption cannot renounce his right for a compensation, because it is a mere personal right, and not a subject of exchange. If he stipulates for compensation, he forfeits his right, and is not entitled to the compensation.[3] For the same reason the right becomes extinct, when the claimant dies before obtaining a decree; but if he dies after having obtained a decree without having paid the price, or obtained possession of the property, his right devolves upon his heirs, who become resposible for the price.

[1] Mahomed and Zaffir contend, that the father or guardian cannot lawfully resign this right, and that the minor is entitled to claim it, as soon as he attains maturity, because it is a personal right, firmly established in the infant, to which their authority does not extend; and their authority is vested in them in order that they may prevent any injury to the minor, but by relinquishing his right, they would cause an injury, instead of preventing one. Aboo Haneefa and Aboo Yoosef however are of opinion, that the father and the guardian may legally resign the right expressly, as well as tacitly, on the grounds, that the right is virtually a purchase, and may either be productive of loss, or of gain, and that the relinquishment may therefore really be for the benefit of the minor. Hedaya, vol. iii. p. 608.

Digitized by Google

[2] Hedaya, vol. iii. p. 603.
[3] Hedaya, vol. iii. p. 599.
[4] Hedaya, vol. iii. p. 600.

418. The right of pre-emption exists in every case where the property is transferred for a consideration, but otherwise not. It does not exist where the property is transferred in lieu of dower, or for granting a divorce, or on a partition among partners, or as a gift.[1]

The right exist only when the property is transferred for a consideration.

The right is a weak one, and may easily and legally[2] be evaded by some devise or other. The proprietor may, for instance, first sell a part of the property, when, if the person entitled to pre-emption declines to purchase such part, the purchaser of it becomes, as a sharer, entitled to a preference in the purchsse of the other part; or, if the person entitled to pre-emption is a neighbour, the proprietor may first sell that part of the property, to which there is no neighbour, reserving to himself a small part towards the neighbour's side, and afterwards sell the rest to the first purchaser; or, he may sell the property on the condition that he shall have the power of annulling the sale afterwards, and his proprietory right would not be extinguished—and no right of pre-emption consequently exist—till he relinquished that power.[3]

And may be evaded by devises.

[1] Hedaya, vol. iii. p. 592, 594. Princ. Mahomedan Law, p. 47.

[2] Mohomed considers such devices invalid as they are only intend to elude and set at nought the privilege, by which the end of the law in granting, the privilege would be defeated; but Aboo Yoosef contends that such devices are valid, because they prevent the right from ever being established; and the inconvenience that may accrue to the person entitled to the right ought not to be regarded. Hedaya, vol. iii. p. 606.

[3] Hedaya, vol. iii. p. 604.

419. The right of pre-emption, and the rules connected with it under the Mahommedan Law, are just and equitable. The principle on which the right is established, viz., the prevention of disagreement arising from having a bad neighbour, or from partnership, is generally applicable, and even more so, among Hindoos, on account of their division of caste, than among Mussulmans. The right belongs under the Mahommedan Law, to every person without distinction of sex, age, or creed;[1] and having thus for centuries been recognized by the law of the land (Sect. 9) as a common right belonging to all persons without regard to the religion they profess, it ought still to be regarded as such. (Sect. 10).

The right of pre-emption is an equitable right and should generally be upheld.

Digitized by Google

The Hindu Law does not recognise this right, yet some hold the right to exist.

According to the Hindn Law there is no right of pre-emption,[2] yet some Pundits declare that neighbours have the right,[3] others, that it belongs, to sharers.[4] In one case the Sudder Dewanny Adawlut is of opinion, that the right is peculiarily just and proper,[5] and should be admitted among Hindoos, as being conformable with justice and equity; in another, that justice requires that among Hindoos the claim of pre-emption should be decided according to Hindu Law, and the right not be admitted.[6] The right has been admitted in Tirhoot in case of common tenancy, on the strength of local custom, of precedent, and of equity:[7] it has been rejected in Bengal in a case of common tenancy, as unsupported by Hindu Law.[8] Local custom will generally uphold the right in most places among Hindoos; and the rules of the Mahommedan Law with regard to this right, should then at least be strictly followed, because the right originates in the Mahommedan Law, and the restrictions are inseparably connected with the right.[9]

1 Hedaya, vol. iii. p. 592.

2 Daya Bhaga, ch. ii. No. 31, Nareda, "When there are many persons sprung from one man, who have duties apart, and transactions apart, and are separate in business, and character, if they be accordant in affairs, should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth." Princ. Hindu Law, vol. ii. p. 297, S. D. A. Rep. vol. i. p. 1; vol. iii. p. 17.

3 Princ. Hindu Law, vol. ii. p. 297.

4 S. D. A. Rep. vol. v. p. 71. Note. Quoting this verse from Maha Narvand Tatra, as the words of the divinity Siva: "Although the price of land may have been settled by another, still, if a neighbour desiring to purchase, tender that price, (he shall be) the buyer, not that other person."

5 Omed Raj *versus* Nached Raj. S. D. A. Rep. vol. v. p. 71.

6 Sakina Khatun *versus* Gour Sunker Shen. S. D. A. Rep. vol. v. p. 303.

7 Ramkuhnaee Raj. *versus* Bung Chand Banurjee, S. D. A. Rep. vol. iii. p. 17.

8 Ramruttun Sing *versus* Chunder Narain Raj. S. D. A. Rep. vol. i. p. 1. Sakina Khatun *versus* Gour Sunker Shen. Ibid, vol. v. p. 299.

9 The Judge remarked, (S. D. A. Rep. vol. v. p. 71,) that, the parties being Hindoos, to adhere to a technical point of the Mahomedan Law, viz., to the period within which the claim was to be preferred,—was improper! ! but why?

10. *On the effect of the annulment of a sale.*

The Mahommedan Law distinguishes be-

420. The Mahomedan Law distinguishes between a null, an invalid, and an improper (also called an abominable) sale. A sale

Digitized by Google

is null, where its subject is not of an appreciable nature, for instance, a sale of a freeman, of a bird in the air, &c.; it is invalid, where it is lawful witten respect to its essence, but not with respect to its quality, for instance, a sale on conditions which could not legally be stipulated for in the same contract (Sect. 332), or a sale contrary to another person's right of pre-emption (Sect. 413), but the terms null and invalid are used indiscriminately. A sale of the property of another without his consent, and a sale by a minor, or a married woman of property not her own, is null. An improper sale is such as is lawful both in its essence and quality, but attended with some circumstances of impropriety, or abomination, as for instance, a sale on a Friday, a sale of blood and carrion, &c.[1]

tween a null, an invalid, and an improper sale.

When a sale is null, no sale is considered to have been effected; the parties have no rights under the sale. The subject matter of the sale in the hands of the purchaser, and the price in the hands of the seller, is considered as a trust. if the thing, or the price, perish by accident, it is lost to the owner; but if it perish, or become deteriorated, by any act of the possessor, he is responsible. The fruits of the thing, or of the price, belong to the actual owner, not to the possessor.[2]

When a sale is invalid, the purchaser becomes proprietor of the article upon taking possession of it, and is responsible for its *value*, not for its *price*, if it be deteriorated, or lost in his hands. During possession, the fruits of the property, and the use of the price accrue to each party on the strength of the contract.[3] If the purchaser under an invalid sale sells the article, the second sale is valid; the purchaser's right of annulling the sale expires, and the seller can only recover the *value* of the thing from the first purchaser.[4] The seller under an invalid sale is entitled to resume the goods from the purchaser, but not till he restore the purchase money; if the property is changed, altered or improved by the purchaser, the seller cannot resume the thing; he can only recover the *value* of it, as the purchaser acted in virtue of a power from the seller on an idea of perpetual possession.[5]

When the sale is improper or abominable, it is null;[6] but when it is abominable only on account of some extraneous point, for instance, a sale on a Friday, it is legally valid, though improper.

Digitized by Google

1 Hedaya, vol. ii. p. 428.
2 Hedaya, vol. ii. p. 429.
3 Hedaya, vol. ii. p. 454.
4 Hedaya, vol. ii. p. 455.
5 Hedaya, vol. ii. p. 457.
6 Hedaya, vol. ii. p. 428.
7 Hedaya, vol. ii. p. 461.

The fruits, (mesne profits) are always to be restored to the real owner.

421. The law makes no distinction with regard to the fruits of the thing (the mesne profits) between a purchase made in good faith, or in bad faith.[1] In both cases the property is equally a trust in the hands of the purchaser, and when the property is to be returned, its fruits (mesne profits) must also be returned.[2] For instance, in case A. a minor, sells an estate to B. the sale is void, and B. must return the property, when it is claimed, with its mesne profits; and if B. had sold the property to C. and C. to D.; D. must return the property to A. with its profits during the time of his possession; and C. must return the profits he has had during the time of his possession, though both of them may have been quite unaware of the defect in B's title.

1 Hedaya, vol. ii. p. 508, 514.

2 Yet see case Kishen Govindo *versus* Lalmohun Takoor, S. D. A. Rep. vol. ii. p. 309, where mesne profits were disallowed, because the claimant had allowed his claim to lie dormant for many years, and the purchase had been made in good faith.

but the effect of deterioration, or of augmentations to the property depends on the cause and intention of the act.

422. It is otherwise with regard to deterioration and augmentations to the property during the possession of the purchaser, because these are caused by *separate* acts of the purchaser and are therefore determinable wilh reference to the cause and intention which occassioned them. If the purchaser acted in good faith, he is not responsible for deterioration, but is entitled to compensation for augmentations from the person who occasioned the illegal act; and if the purchaser acted in bad faith, he is responsible for the deterioration caused by his own acts and by the acts of others, and is not entitled to any compensation for augmentations.

1 Hedaya, vol. iii. p. 526, 533.

Effect of the annulment of a sale with regard to the proprietor, the seller and the purchaser.

423. The effects of the annulment of a sale may be considered separately, as regards, 1, the obligations of the purchaser towards the real proprietor; 2, the obligations of the seller towards the real proprietor; and 3, the obligations of the seller towards the purchaser.

Digitized by Google

1. *Obligations of the Purchaser towards the real Proprietor.*

424. The real proprietor is entitled to recover from the purchaser the property of which he has been illegally dispossessed, or which he has transferred by a sale which was void, together with all the fruits that have accrued during the possession of the purchaser, deducting of course all such expenses as were necessary for obtaining the fruits.

The proprietor entitled to recover the property and its fruits in a sale which was null.

If the property, during the period of dispossession, has passed through the hands of several purchasers, the proprietor must recover separately the fruits which each of them has obtained, and if any further loss has been occasioned by the dispossession, such loss can only be recovered from the dispossessor under the general rules for damages.

When the sale was, what is, strictly speaking, termed invalid, and not what is termed null and void, the seller can recover the property from the purchaser only on restoring the price. He can neither recover the fruits from him, nor the thing itself or its fruits from a succeeding purchaser. (Sect. 420).

In invalid sale he can recover only from the immediate purchaser on repaying the price.

425. In case the property has been deteriorated or augmented during the time the purchaser held possession, for instance, by planting trees, building houses, &c., on the ground, the real proprietor is still entitled to recover the property. If the purchaser held possession in good faith, damages for deterioration cannot be recovered from him ; but he is responsible, if he held possession in bad faith. The purchaser is always entitled to remove additions or augmentations to the property, whether he possessed it in good, or in bad faith, so as to restore the property to its original state, because the proprietor had only possession of it in its original state.[1] When however the removal might be injurious to the land, the proprietor has the option of paying a compensation for the trees, or the buildings, equal to their value *when removed* from the ground, because this is an advantage to both, and an injury to none. The proprietor is not bound to take the additions and give compensation, as this might be an injury to him, either because the additions may be useless to him, or he may not have the means of paying for them.

When the property has been deteriorated or augmented.

[1] Hedaya, vol. iii. p. 539.

Digitized by Google

When the property has been altered so that it cannot be restored to its original state.

426. If the thing has been altered during the period of dispossession so that it cannot be restored to its original state; for instance, if gold or silver has been converted into vessels; cloth dyed, or converted into wearing apparel, building materials applied to buildings, and so forth, the right of the proprietor in the materials is lost, and he can only recover full compensation.

Aboo Huneefah is of opinion that the real proprietor may recover the thing in its altered state, and that the fraudulent possessor is entitled to no compensation for his workmanship; but his disciples contend, that whenever a valuable operation has taken place, the proprietor must be contented with full compensation by means of course of the altered thing, if necessary; because the restoration of the thing to its original state has become impossible, and the proprietor suffers no injury, when he obtains compensation; but if the purchaser were to lose his workmanship, he would sustain a positive loss.[1]

Or only to the great detriment of the other party.

When a beam or other materials is built into a house, so that it might be restored, but not without great detriment to the other party, it is for the same reasons held, that the right of the proprietor is converted into a right to full compensation.[2]

1 Hedaya, vol. iii. p. 536.

2 Hedaya, vol. iii, p. 537.

Exception under the Hindu Law in case of a market sale.

427. The Hindu Law makes a very equitable distinction, as regards the recovery of a thing, between a sale made publicly in the market, and a sale made privately at other places. The real proprietor can in both cases recover the thing from the purchaser, who again can recover the price from the seller; but when the purchaser can prove that he bought the article openly in the market,[1] and is unable to produce the seller, the proprietor can only recover from him *on payment of half the value of the thing.* To purchase a thing from an unknown seller, says the sage, is one fault; negligence in keeping the thing is another, and these two causes are to be considered as just causes of loss to each.[2]

1 Catyayana, Digest, book ii. ch. ii. sect. 35, "the defendant not clearly proving an open sale to him, are not pointing out the seller, shall be made to deliver the thing claimed, and to pay a fine."

2 Vrihaspati, Digest, book ii. ch. ii. sect. 53, 54. Menu, book viii, sect. 202, Digest, book ii. ch. ii. sect. 50.

Digitized by Google

2. *Obligations of the Seller towards the real Proprietor.*

428. The rights of the proprietor against the seller result from the general rules for damages, as being strictly the effect of an act done contrary to Law. When the dispossessed proprietor has obtained full compensation from the purchaser for the injury done to him, he has of course no further claim upon the seller; but when this has not been the case, either because the thing has been destroyed without any fault on the part of the purchaser, or because no compensation has been obtainable from him, or only a part of the loss sustained has been compensated for by the restitution of the thing, the dispossessed proprietor may sue the seller, and recover equitable damages from him according to the circumstances of the case.

Obligations of the seller towards the real proprietor result from the rules for damages.

3. *Obligations of the Seller towards the Purchaser.*

429. It is the duty of the seller to warrant quiet possession of the thing sold to the purchaser, (Sect. 400); whenever therefore the property has been recovered from the purchaser by a third party, he is entitled to recover:

Obligations of the seller towards the purchaser.

1. The price which has been paid. Should the property, at the time it was recovered from the purchaser, have been found lessened in value, either on account of a fall in its marketable price, or on account of deterioration, through neglect of the purchaser, or through accident, the seller is nevertheless obliged to restore the whole sale-amount, because the sale was void from the beginning, and the purchaser is responsible to the owner for his separate acts relative to the property, but is not responsible to the seller.

2. Equitable interest on the price from the day it was paid till it is actually returned.[1] When an auction sale is annulled for arrears of revenue, the rate of interest is to be the highest rate of the public securities, Reg. 12, 1841, Sect. 18, 26. In other cases the rate of interest is to be fixed by the Court according to circumstances, viz., with due regard to the profit the purchaser might have obtained from the property, if the sale had been valid, and the profit he otherwise might have obtained by

Digitized by Google

means of the purchase-amount. It need not necessarily be fixed at the common rate of interest 12 per cent., but can never exceed that rate. Cir. Order, 7th April, (5th May) 1837, Para. 3.

3. Compensation for actual loss caused by the annulment of the sale. This includes restitution for outlay on, or on account of, the purchase, as costs for the registry of the sale-deed and transfer of the property; expenses for improvements, or additions to the property; for which no return has been obtained on restoring the property to the proprietor; compensation for profit, which might have been obtained in case the purchase had been valid, &c.[2]

4. All costs and legal expenses incurred by the purchaser in the defence of his rights under the purchase.

[1] On the annulment of a sale in execution of a decree, the purchase money is to be returned with or without interest, as may appear proper in each instance. Reg. 7, 1825, Sect. 3, Cl. 4; Sect. 5, Cl. 1.

[2] On a sale of Putnee Talooks for arrears of rent, the under-tenants may claim the price they have paid for the tenure, *or* a just compensation for the loss sustained. Reg. 8, 1819, Sect. 18, Cl. 1. On the annulment of a sale for arrears of revenue occasioned by the neglect of the proprietor, the purchaser is entitled to a moderate compensation *for his loss* not exceeding interest at the current rate of Government Securities on the amount of deposit or balance of purchase money during the period of its being retained in the Collector's office; Reg. 12, 1841, Sect. 18, and when the sale is annulled by the order of Government, equitable damages are to be awarded to the purchaser. Ibid, Sect. 19.

When only a part of the property has been recovered from the purchaser.

430. When only a part of the thing has been recovered from the purchaser, for instance, some lands as istimraree, or as rent-free, from an estate with which they were sold as assessable lands, the purchaser may either annul the whole purchase, or recover full compensation for the part, the sale of which has been annulled, according to its value at the time it was adjudged void.[1]

When a portion of articles of weight or measurement is recovered from the purchaser, he cannot return the other portion; he can only recover a proportional compensation, as each weight or measure is considered a separate thing.[2]

[1] Ramdoolal Misser *versus* Modun Mohun Bottarcharjee, S. D. A. Rep. vol. ii. p. 143.

[2] Hedaya, vol. ii. p. 422.

Obligations of

431. The liability of the seller ceases, when the purchaser has

Digitized by Google

allowed a decree to pass against him without summoning the seller to prove his title to the property in dispute, and the seller is able afterwards to prove, that he could have defended the purchaser in possession, if he had been called upon to do so at the time.

the seller, when ceases.

Digitized by Google

BOOK VI.

ON MORTGAGE AND PAWN.

1. *On the requisites to a Mortgage and Pawn.*

What a mortgage or pawn is.

432. A mortgage or pawn is an accessory, or secondary contract by which a person transfers to another, valuables in security for the fulfilment of another contract. It is termed a mortgage, when real property is transferred; and a pawn when moveable property is transferred. Generally, property is mortgaged or pawned for the payment of a debt; but it may also be thus pledged as security for the fulfilment of any other engagement, for instance, in security for the fulfilment of the duties of an office, or any other agreement.

A mortgage is rendered valid by consent and delivery of possession, or of title deeds; a pawn by consent and actual delivery.

433. A mortgage or pawn is established by the consent of the parties and the delivery of the pledge: viz., the actual delivery of moveable property, and the delivery of the possession of real property, or of its title deeds.

Under the Mahomedan Law, or mortgage or pawn is in its very nature considered to be a contract that requires the pledge to be actually delivered to the mortgagee, or pawnee, or to some other person on his behalf; for the end of the contract cannot be obtained without delivery, viz., the mortgagee may detain the thing in his possession as security for the fulfilment of the principal engagement, and, in case of non-fulfilment, obtain payment by the realization of the pledge in preference over all other creditors of the mortgager. Actual delivery is therefore considered equally necessary in a mortgage, as in a pawn.[1] An agreement to the effect that the debtor will give security, cannot be enforced, as the giving of a pledge is considered a *voluntary* act of the debtor. When the stipulator does not obtain the security that has been promised, he can merely annul the contract

Digitized by Google

on account of non-fulfilment of the condition, and inforce instant payment of whatever may be due to him.[2]

Under the Hindu Law, it seems that a mortgage might be established by the consent of the parties alone, without delivery of the pledge,[3] and either for this, or for some other season, it has become customary to mortgage real property by a verbal, or written agreement, and a mere deposit of the title deeds, without giving actual possession of the property to the mortgagee. This custom is now recognized as valid,[4] and has become law. Reg. 15, 1793, Sect. 10; Reg. 1, 1798, Sect. 2; Reg. 17, 1806, Sect 7.

Registry does not substantiate the mortgage.

Under the laws of most other civilized nations, a mortgage can neither be established by a deed, nor by delivery, but only by the registry of the deed. The registry is made a substitute for the actual delivery of real property, and a mortgage, either with actual possession of the property, or with possession of the title deeds, without registry, gives no title to preference over other creditors. But this is not the case under the register laws of this country. The registry does not establish the mortgage, but gives merely the mortgagee preference over all other claimants under an unregistered, or a later registered title deed, whether these have, or have not, got possession of the property. That a creditor is a mortgage-creditor must be established independently of the registry,[5] and custom absolutely requires, that the mortgagee shall have possession of the title deeds, or actual possession of the property. A deed called a mortgage bond, and specifying the property said to have been mortgaged, but without giving possession of the property, or its title deeds, is, even when registered, a mere bond, and entitles the creditor to no preference over other creditors.

Second mortgage how to be established.

A second mortgage, that is to say a mortgage by which the mortgager pledges property which has already been legally pledged to another, on the condition, that the mortgagee shall have preference for his demand over other creditors *after* the first mortgagee has been satfsfied, can only be legally established by giving actual possession of the property to the first mortgagee, and possession of the title deeds to the second mortgagee, or by

Digitized by Google

depositing the title deeds in the hands of a third party as trustee for both mortgagees.

1 Hedaya, vol. iv. p. 189. Princ. Mahomedan Law, p. 74.

2 Hedaya, vol. iv. p. 221.

3 Vrihaspati, Digest, book i. ch. 1, sect. 80: "a pledge is either moveable or personal, and fixed or real: for custody only, and for use, unlimited or limited as to time, with a written contract and with a verbal attested agreement."

4 Mahommud Jaun Chowdry *versus* Ramrutton Doss. S. D. A. Rep. vol. ii. p. 146. Puddumchurn Mohapater *versus* Ramalal Pandey. Ibid, vol. ii. p. 200. Syud Khadim Ullee (a Mossulman) *versus* Duljeet Sing. Ibid. vol. ii. p. 225.

5 Reg. 36, 1793, sect. 6, Cl. 2. Ben. Reg. 28, 1795, sect. 2. Ced. and Conq. Prov. Reg. 17, 1803, sect. 6, Cl. 2. Reg. 19, 1843, sect. 2.

Consent either express or implied.

434. The consent of the parties may either be given by express words or implication; for instance, when a person purchases goods, and gives the seller some other things to keep until such time as he pays him the purchase money;[1] or when he gives materials to a workman for performing some work on it; in which case the workman is entitled to detain the materials, as if they had been pawned to him, until he is paid for his work.[2]

1 Hedaya, vol. iv. p. 222.

2 Hedaya, vol. iii. p. 320.

Mortgage or pawn is either common, or usufructuary.

435. A mortgage, or pawn, is either common, when only the detention of the thing is stipulated, or usufructuary, when it is stipulated that the mortgagee, or pawnee, shall have the use or the usufruct of the thing during the time it is detained in his possession.[1]

It originates either from a contract or from the common law.

A mortgage may either originate from the consent of the parties, or from positive enactments; as for instance, the right of a proprietor of lands in the crops grown upon the lands for rents due to him by his tenants.

2. *Who can mortgage, or pawn property.?*

Who can mortgage or pawn.

436. Every person who can sell or alienate property (Sect. 334,) can generally also give it in mortgage, or pawn; and those who cannot sell or alienate their property, can neither mortgage or pawn it; because though, strictly speaking, only the detention of the pledge is contracted for, a sale of it may be the ultimate consequence in case the debt be not paid, or the conditions of the principal contract be not fulfilled.

Digitized by Google

A guardian may legally pledge the property of his ward, even to himself, for necessaries furnished to the ward. A father may pledge the property of his son, even for his own debt; because he has an unlimited power over the property belonging to his son. (Sect. 287.) The son can recover the pledge only by redeeming it, but he may afterwards prefer a claim against his father for the debt which has been paid by means of his property.[2]

A partner of joint real property can mortgage his own share, but not the shares of the other partners without their consent;[1] even the managing partner cannot mortgage the whole property, except in cases of necessity, when the other partners are minors, or absent. According to the Benares and Mithila school of the Hindu Law, a mortgage of a share of joint property is wholly invalid without a prior division. (See Sect. 337, No. 2.)

A partner cannot pawn joint moveable property without the consent of the other partners, or a prior division, as such property cannot be pawned without delivery, and delivery is legally impossible. If a partner pawns joint moveable property, the other partners may recover possession at any time, and the pawnee's right to preferable payment by means of the property is extinguished, even for the share of the pawner; because the pawnee has no preferable right without possession of the thing.

1 Hedaya, vol. iv. p. 215.

2 Hedaya, vol. iv. p. 215.

3 See Sect. 337, No. 2. Sect. 338, No. 4. Shewa Doss *versus* Bishenath Dhobee S. D. A. Rep. vol. i. p. 126. Digest, book v. sect 390, note.

3. *What things are capable of being mortgaged or pawned?*

437. Every thing which is capable of being detained in the possession of another, and which is not by its nature, or by law, exempted from traffic, (Sect. 339) can be mortgaged or pawned. What things are capable of being mortgaged or pawned.

An indefinite part of an article, or a share of joint undivided moveable property, cannot be pawned, as seizin is impossible; an article naturally conjoined to another, cannot be pawned separately; thus the fruit on the tree, cannot be pledged without the tree; or the crop, without the ground on which it grows, &c.[1]

Salary, or wages, cannot be pledged, as seizin cannot take

Digitized by Google

place before the salary falls due. If the master however gives his consent to a contract of this nature, he is considered as holding the wages as a trustee for the creditor, and becomes responsible to him for the amount of the wages during the time the debtor remains his servant.[2] He is not of course bound to keep the servant in his service until the debt be paid, but is merely responsible to the creditor in case he should pay the wages to the servant, or to any other, during the time the servant remains in his service.

A thing once pawned can be pawned over again by the delivery of the pledge into the hands of a third party to hold as trustee for both parties. Real property can be mortgaged a second time by giving actual possession of the property to the first mortgagee, and possession of the title deeds to the second mortgagee, or by depositing the title deeds in the hands of a third party to hold as trustee for both mortgagees. (Sect. 433.)

[1] Hedaya, vol. iv. p. 204.

[2] Hedaya, vol. iv. p. 232. Digest, book i. ch. i. sect. 27.

4. *Form of a Mortgage, or Pawn.*

Form of a mortgage, or pawn.

438. The law does not prescribe any particular form for this contract. It may be either made verbally or executed in writing. When the deed is executed in writing, it must be written upon stamp paper of a value responding to the value assured. When the mortgage is given as security for the fulfilment of an engagement, the value must respond to the sum limited in the contract, or, if the sum be unlimited, to whatever sum the parties may choose, but no further sum can be recovered under the deed, than what may be covered by the stamp. If the mortgage is executed as security for an annuity for an unlimited period, the value of the stamp paper must be ten times the annual payment. When the mortgage is given as a collateral security for some other transaction already charged with the stamp duty, the bond is to be written upon paper of a like stamp with the principal deed, not exceeding eight Rupees, which is the maximum. Reg. 10, 1829, A. 18, 35 to 39.

The deed is to be signed and witnessed, Reg. 3, 1793, Sect. 15,

and may be registered. Reg. 36, 1793, Sect. 6, Cl. 1. Reg. 28, 1795, Sect. 2 Ced. and Conq. Prov. Reg. 17, 1803, Sect. 6, Cl. 1. (Sect. 340.) The registry does not substantiate the mortgage, (see Sect. 433) but gives to a legal mortgage preference over one registered at a later period, and over all unregistered deeds of sale, gift or mortgage. Reg. 36, 1793, Sect. 6, Cl. 2. Ben. Reg. 28, 1795, Sect. 2. Ced. and Conq. Prov. Reg. 17, 1803, Sect. 6, Cl. 2. Reg. 19, 1843, Sect. 2.

Whether a contract is a mortgage or pawn, or not, depends on its real nature, not upon the name given to the contract; thus a lease granted in consideration of an advance of a sum of money, is a mortgage, and the lessee is not allowed to realize a greater profit from the lease than common interest;[1] and a bond by which a person designating himself a proprietor of certain estates, becomes security for another without expressly stating that those estates are pledged as security for the debt, is not a mortgage. Const. No. 1017, 24th June (15th July) 1836.

The pledge may be given into the hands of a third party.

A pawn may be executed by the parties agreeing to place the pledge in the hands of a third party, who then becomes the trustee for them both. If the trustee delivers the pledge to the pawner, he becomes responsible to the pawnee for the debt; and if he delivers it to the pawnee, he becomes responsible to the pawner for its value. In case the pledge is lost or damaged while in possession of the trustee, the pawnee is responsible, because the trustee took possession for him and on his responsibility.[2]

1 Mohunt Te ekumbhartee *versus* Syud Ishan Ali. S. D. A. Rep. vol. iv. p. 251. Golam Kadir *versus* Roy Nim Chunder Ray. Ibid, vol. v. p. 9, n.

2 Hedaya, vol. iv. p. 282.

5. *On usufructuary Mortgage, or Pawn.*

Usufructuary mortgage, or pawn.

439. The mortgagee, or pawnee, has no right to use the pledge, or to apply the usufruct of it to his own benefit, except this has been specially stipulated for in the contract, or is necessary for the preservation of the pledge; for instance, a cow must be milked; a horse must be exercised, &c.

Under the Mahomedan Law it is not lawful for the mortgagee,

Digitized by Google

or pawnee, in any shape to enjoy the use of the pledge, as all interest is considered usury;[1] but under the Hindu Law,[2] and by custom, this species of mortgage is valid; and its validity is now recognized by the Regulations. Reg. 15, 1793, Sect. 10.

In a mortgage of lands, it is customary, when possession of the land is given to the mortgagee, to stipulate that the mortgagee shall enjoy the property until payment of the principal, in lieu of interest.[1] According to the general terms of contracts of this nature, the mortgagee would be entitled to enjoy the whole profit of the lands until the payment of the principal without giving any account of it; but as interest is not allowed by law to exceed twelve per cent, the mortgagee is bound to deduct from the principal any sum which may be realized from the usufruct beyond legal interest. Reg. 15, 1793, Sec. 10. Ben. Reg. 17, 1806, Sect. 5. Ced. and Conq. Prov. Reg. 34, 1803, Sect. 9. The mortgagee is for this reason always obliged to be prepared to produce a full and clear account of his receipts and expenditure, in order to shew what profit has been actually realized from the lands under the mortgage.

1 Hedaya, vol. iv. p. 199.

2 Vrihaspati, Digest, book i. ch. i. sect. 35, "thus the daily interest can only cease by the payment of the principal. The rent, or use and occupation of a pledged house, or the produce of a pledged field, is called bhoga baddha, interest by enjoyment." Catyayana, ibid, i. ch. i. sect. 37, No. 3, "where a loan is made on an agreement, that the whole use and profit of a pledge shall be the only interest, it is called a loan on the use of a pledge."

Payment must be made at the time stipulated for, or at the option of the mortgager.

440. If, in this species of mortgage, a certain and definite time for the payment of the principal has been stipulated for, the mortgager is to pay the sum at that time, and is neither entitled to pay it before the term, nor, without the consent of the other party, to delay payment. If no definite time has been stipulated, for the mortgager may redeem the property at any time he pleases, and the mortgagee has no right to demand payment, but must await the convenience of the mortgager.[1]

1 Behari Lal *versus* M. Phekoo. S. D. A. Rep. vol. i. p. 119. M. Khanum *versus* M. Budamoon. Ibid, vol. i. p. 185.

The mortgager may recover the pledge on

441. As soon as the mortgager has paid the amount due to the mortgagee, he can demand that the property shall be surren-

Digitized by Google

dered to him. If the mortgagee denies having received payment in full, the mortgager may recover possession of the mortgaged property *summarily*, on depositing the principal sum borrowed into the Court, Reg. 1, 1798, Sect. 2, and he may afterwards recover the deposit on settling the accounts under a regular suit. Const. No. 339, 25th May, 1821. Should the mortgager be unwilling to deposit the entire principal sum, alleging that the whole or part of it has been paid from the usurfruct, or otherwise, he can only regain possession of his lands by a regular suit. Const. No. 339, 25th May, 1821.

payment, or summarily, on depositing the principal in the Court.

When the mortgager is desirous summarily to obtain possession of his property, he is to deposit the principal sum due under the deed in the Court of the Zillah or City, in which the lands are situated, with a written petition to require the mortgagee to receive the deposit and surrender the property. On receipt of the deposit the Judge is to cause a copy of the application to be served on the mortgagee with a written perwannah under his seal and signature directing him to receive the deposit and surrender the property within a reasonable period, the length of which is to be inserted in the notice. Reg. 17, 1806, Sect. 8. Cir. Order, 22d July, 1813, Para 8. Const. No. 630, 11th May, 1831. If the mortgagee refuse to surrender the property at the time fixed in the notice, the Judge is summarily to put the mortgager in possession, leaving the parties to settle their accounts by a regular suit. Reg. 1, 1798, Sect. 2. Cir. Order, 22d July, 1813, Para 9. Const. No. 339, 25th May, 1821, Para. 2.

When a regular suit has been instituted for the adjustment of accounts, it is the duty of the mortgagee, when required, to produce upon oath the accounts of his gross receipts from the property mortgaged, and of his expenditure for the management and preservation of it, that the actual profit of the usurfruct may be ascertained. Reg. 15, 1793, Sect 11. Ben. Reg. 17, 1806, Sect. 5. Ced. and Conq. Prov. Reg. 34, 1803, Sect. 10.

The mortgagee is of course entitled to the annual profit, if less than legal interest; or to legal interest, if the profit has exceeded that sum, for the whole period, however long, from the time the debt was stipulated until it was repaid. The rule laid down in

Digitized by Google

Reg. 15, 1793, Sect. 6, that the Courts are not to decree a greater sum for interest than the amount of the principal, only regards cases where the interest is in arrear, not those in which the interest is paid, or realized from the usurfruct; or in which it is agreed that the usurfruct shall be received in lieu of interest.[1]

[1] Behari Lal *versus* M. Phekoo. S. D. A. Rep. vol. i. p. 119. Digest, book i. ch. i. sect. 35, No. 5; sect. 37.

6. *On conditional mortgages, otherwise called Bye-bil-wuffa, or Kut-cubaleh.*

On mortgage and conditional sale.

442. A mortgage for the security of money lent on the condition, that if the money is not repaid within a certain time, (with or without interest) the property mortgaged shall become the property of the mortgagee for the sum lent, is generally termed a Bye-bil-wuffa, or Kut-cubaleh.

Under the Mahomedan Law it is questionable, whether this species of contract as regards conditional sales, is valid,[1] but it is unquestionably valid under the Regulations.

[1] S. D. A. Rep. vol. i. p. 57, note.

With or without possession of the property mortgaged.

443. In this species of mortgage, the possession of the property mortgaged is either transferred to the mortgagee, or continues in the possession of the mortgager.

1. *When possession is given to the Mortgagee.*

When possession is given to the mortgagee, the usufruct is generally also given.

444. When possession of the property mortgaged is transferred to the mortgagee, it is generally, but not necessarily, transferred to him on the condition, that he shall enjoy the usufruct of it in lieu of interest, when the above rules. (Sect. 441,) as regards interest, &c., are applicable. If the usufruct of the property has not been stipulated for, the mortgagee will of course be required to give an account of all the profit he may have realised.

How the mortgager is to redeem the property.

445. When the mortgager makes payment in conformity with the terms of the contract, he is entitled to have the property returned to him, and may at any subsequent time recover possession by a regular suit.

In case the mortgagee refuse to accept payment, when tendered to him, or, in case the amount actually due is disputed between

Digitized by Google

the parties, and the mortgager tender payment, within the time stipulated, of the sum which is legally due, the conditional sale becomes foreclosed, and the mortgager may recover possession at any subsequent period, on proof of legal tender of payment within the stipulated time. The tender of payment by a teep, (or cheque) which has not been accepted by the mortgagee, is not considered a legal tender. Reg. 1, 1798, Sect. 4. In order to establish the proof of having made legal tender, the mortgager is at liberty to deposit whatever sum he may consider to be actually due, in the Court of the Zillah or City, in which the property is situated, with a written petition requesting that notice of the deposit may be served on the mortgagee desiring him to accept the deposit, and surrender the property and the conditional bill of sale. When such deposit has been made, the mortgager may at any subsequent time, on proof of the actual balance of his debt, and legal tender of it, recover his property by a regular suit on a complaint of the full value of the property. Reg. 1, 1798, Sect. 5. Const. No. 339, 25th May, 1821, Para. 4. Const. No. 957, 7th August, (17th June,) 1835.

How to get the property surrendered instantly.

If the mortgager is desirous of having the property instantly surrendered, he must deposit at the time stipulated in the bond, or at any subsequent time, the whole amount of principal without interest, whether that sum is actually due or not, in the Court of the Zillah or City in which the property is situated, and apply by a petition as above. On receipt of the deposit, the Judge is to serve a copy of the application upon the mortgagee with a Perwannah under his seal and signature, directing him to receive the deposit and surrender the property and the conditional bill of sale within a reasonable period, (which need not be a year) according to the distance of his residence from the Sudder station. Reg. 1, 1798, Sect. 2; Reg. 17, 1806, Sect. 8. Const. No. 974, 7th August, 1835. Should the mortgagee not surrender the property at the time fixed, or show satisfactory cause why it cannot be surrendered, the Judge is summarily to put the mortgager in possession of the property, leaving the parties to contest their rights and adjust their accounts by a regular suit. Reg. 1, 1798, Sect. 2, 3, 5. Const. No. 339, 25th May, 1821. Cir. Order,

Digitized by Google

22d July, 1813, Para. 9. The Judge is in such case merely to give possession by summary process, and not enter into the merits of the case. Thus, for instance, he is not to enquire whether the mortgage has been actually foreclosed or not, or to entertain any similar questions which may arise in the case, as these questions can only be decided by a regular suit. Reg. 1, 1798, Sect. 5. Cir. Order, 17th January, 1834.

How the mortgage is to become foreclosed.

446. If the mortgager does not make payment at the time stipulated, the mortgage would, under the conditions of the contract, become foreclosed, and the sale conclusive. In order however to prevent the mortgager or his representatives losing the property from want of knowledge of the condition of the contract, and of the intention of the mortgagee to have the sale made absolute, the mortgagee is obliged,[1] when he wishes to have the sale made absolute, to apply at the expiration of the stipulated period, or at any time subsequent (after having demanded payment from the borrower, or his representative,) by a written petition to the City or Zillah Court of the district in which the mortgaged property is situated, that a notice may be served on the mortgager. The Judge on receiving such application is to furnish the mortgager, or his legal representative with a copy of the application, as soon as possible, and at the same time to notify to him, that if he shall not redeem the property mortgaged within one year from *the date of the notification*,[2] (Const. 263, 23d January, 1807,) the mortgage will be foreclosed, and the conditional sale will become conclusive. Reg. 17, 1806, Sect. 8. Cir. Order, 22d July, 1813. The notification ought of course to be issued as soon as posible after the receipt of the application, and, like other official documents, it should bear the date on which it was actually issued and signed. Cir. Order, 9th April, 1817. If the mortgager makes payment or legal tender of payment within the year of grace, the conditional sale becomes void, and he is entitled to have the property surrendered to him; but if he fail to pay within that period, the sale becomes final and conclusive.

1 The term fixed by Reg. 17, 1806, cannot be evaded by the mortgagee by a conditional clause, that the sale, when certain conditions are not fulfilled, shall become absolute before that time. Arman Pande *versus* Nourrutton Koonwur, S. D. A. Rep. vol. iii. p. 78.

Digitized by Google

[2] [Yet see case Hussein Ali Khan *versus* Mahomed Thool Ras Koor S. D. A. Rep. vol. iv. p. 5, in which the year of grace was calculated from the receipt of the notice.

2. *When Possession is not given to the Mortgagee.*

447. When possession of the property mortgaged is not given to the mortgagee, and the mortgager does not make payment at the time stipulated, and the mortgagee is desirous of having the mortgage foreclosed and obtaining possession of the property mortgaged, he may, at the stipulated time, or at any subsequent period, present a written petition to the Judge of the Court of the Zillah or City in which the mortgaged property is situated, for a notice to be served on the mortgager. On receipt of the petition, the Judge is to notify the same in the manner described in Sect. 446, to the mortgager. Should the mortgager not make payment within the year of grace, or refuse to give possession of the property to the mortgagee, the mortgagee is obliged to institute a regular suit against him, and can obtain possession of the property only on proving his demand, and the nonfulfilment of the conditions of the contract, and the issue of legal notice for the foreclosure of the mortgage. Reg. 17, 1806, Sect. 8. Cir. Order 22d July, 1813, Para. 3 and 4. The Judge is not authorised in such case to put the mortgagee in possession on a summary investigation, or otherwise than in conformity with a decree passed in a regular suit. Const. No. 80, 14th March, 1811.

When possession of the mortgaged property has not been given, how the mortgager is to obtain possession.

In the regular suit, the Court will inquire into the whole transaction of the parties, and not merely into the fact whether the mortgage has been foreclosed or not, and will decide accordingly. Const. No. 1140, 23rd (2nd) March, 1838. If, for instance, there has been usury in the case, the mortgagee may forfeit the interest, or the principal as well as interest, according to circumstances, under Reg. 15, 1793, Sect. 8, 9, even though the whole process for foreclosure has been regularly gone through.[1]

The mortgagee cannot demand payment in lieu of possession of the property, at the end of the period, when the sale has become absolute, because this would be contrary to the terms of the con-

Digitized by Google

tract, which only entitle him to possession of the property, if it be not redeemed. Const. No. 898, 5th September, 1834.

[1] Luchmun Pooree *versus* Jowahir Geer. S. D. A. Rep. vol. iv. p. 106. Khedoo Lal Khatri *versus* Rattan Khatri. Ibid, vol. v. p. 10.

When payment, or tender of payment, is made before the expiration of the year of grace, the conditional sale becomes foreclosed.

448. Whenever the mortgager makes payment, or legal tender of payment within the time stipulated in the contract, or within the year of grace, the conditional sale becomes annulled, and the mortgagee cannot afterwards obtain possession of the property, but can merely recover whatever sum may actually be due to him. Reg. 1, 1798, Sect. 2. A teep (a cheque) is not considered a legal tender unless the lender accepts of it. Ibid, Sect. 4. To secure the proof of having made legal tender before the expiration of the term, the mortgager is at liberty to deposit in Court the sum he considers to be due as above. (Sect. 446.) The Judge will then issue a notice to the mortgagee and request him to receive payment and surrender the conditional bill of sale. Reg. 1, 1798, Sect. 2. If however the amount of the debt be disputed between the parties, the mortgager may be obliged, in order to prevent the mortgage from being foreclosed, to deposit in Court the whole amount, principal and interest, Reg. 1, 1798, Sect. 2, since a deposit of a sum less than that which may ultimately be found to be the amount of the actual debt, will not prevent the mortgage from being foreclosed, and the sale from becoming conclusive.[1] If the mortgager has deposited more than the sum actually due, he may of course recover it afterwards under a regular suit. Const. No. 339, 25th May, 1821, para. 4.

[1] M. Mani Bebee *versus* M. Sahibzadi. S. D. A. Rep. vol. v. p. 108. Bhuwanee Suhai *versus* Uchruj Lal. Ibid, vol. iii. p. 225.

When a compromise takes place after the process for foreclosure has been issued.

449. After the above process to foreclose the mortgage has taken place, when the parties enter into an amicable arrangement relative to the payment of the balance the effect of this new arrangement, as regards the foreclosure of the mortgage, will depend on the circumstance, whether the original agreement is to remain in force, or is to be cancelled, and a new and separate agreement entered into. If the original agreement remains in force, and only a prolongation of the time for redeeming the property is granted, there is no reason for serving the notice a second time,

Digitized by Google

and the sale will become absolute at the expiration of the term stipulated by the new agreement;[1] but if the original agreement has been cancelled, and a new covenant has been entered into, either after the release of a portion of the property, or after a consolidation of the old accounts, the mortgage under the new covenant becomes a distinct, new and separate mortgage, and will not become foreclosed, until the whole process above stated has been gone through again, as under the original contract.[2]

1 Pranath Raj *versus* Raja Gobindo Chundro Raj. S. D. A. Rep. vol. v. p. 37.

2 Porusnath Chowdry *versus* Lala Behary Lal. S. D. A. Rep. vol. v. p. 346.

7. *On Mortgages established by Law.*

450. All creditors have, according to natural law, an equal right to demand and enforce payment from their debtors.[1] A preference given to one creditor over another, is an injury to the less favoured creditor, and cannot therefore be admitted except under a clear and distinct provision of law. The law gives no preference to a debt which was contracted at an earlier period, over that which was contracted at a later period; nor to a debt which originates in a written contract, over that which originates in a verbal contract; nor to a debt which is registered, over that which is unregistered. Reg. 19, 1843, Sect. 3. A debt for house-rent, or on account of wages, has no preference over other claims; a debt due according to a decree, has no preference over a debt which is still disputed, if the decree is not followed up by attachment.

On mortgage by law; creditors have generally an equal right to obtain payment.

The exceptions from this general rule of equality are:

Exceptions.

1. Government has preference over all other claims for arrears of revenue in the estate for which arrears are due. Reg. 1, 1793, Sect. 10. Reg. 12, 1841.

2. A proprietor of lands has preference over all other claims for arrears of rent due to him for the current year in the crops growing or grown upon the lands for which arrears are due; Reg. 7, 1799, Sect. 9. Reg. 2, 1806, Sect. 15, Cl. 3. Const. No. 33, 21st January, 1808. Const. No. 343, 19th April, 1822, as

Digitized by Google

well as in the house and buildings erected on the ground, on the strength of analogy.

A proprietor of lands has no preference over other creditors in other property belonging to the tenant,[2] nor have landlords generally any preference over other creditors to payment by the realisation of the personal property in the house belonging to the tenant.

3. A person making advances to a ryot under a written engagement for the cultivation of indigo on a defined portion of land, has a lien upon the indigo grown upon the land; but the planter is conjointly with the ryot responsible for any arrear of rent due on that specific parcel of ground. Reg. 6, 1823, Sect. 2, 4, Cl. 2.

4. A debt incurred during health, has, according to Mahomedan Law, a preference over one for which there is no other evidence than the acknowledgment of the deceased on his death bed.[3]

An attachment of property, either before, or after a decree, entitles the attaching party to no preference. It prevents the owner of the property from legally alienating the property sequestered, (Reg. 2, 1806, Sect. 5, Cl. 2,) and thereby secures the plaintiff's right according to the uitimate decree; but it does not interfere with the legal rights of others. Property attached by one party may, during the attachment, be attached by another. Property attached before a decree, may be attached by another under a decree; and when property attached is sold, all decreeholders, who have caused process of attachment to be issued prior to the distribution of the proceeds of sale, share in proportion to the amount of their claim; with the exception of mortgagees, who of course are paid first form the proceeds of the property mortgaged. Const. No. 935, 22d February, 1835.

1 Hedaya, vol. iii. p. 361, 484.

2 It is said in Sect. 245, that, "the property in the house" is also considered as mortgaged to the proprietor of lands, which is incorrect. He may attach it for arrears of rent, and cause it to be sold without obtaining a decree; but he has no preference over other creditors, who may have attached the property.

3 Hedaya, vol. iii. p. 163.

Digitized by Google

8. *On the Rights and obligations of the Mortgagee, or Pawnee.*

451. The rights and obligations of the mortgagee, or pawnee, are as follows :

Rights and obligations of the mortgager.

1. He is entitled to detain the property, which has been mortgaged and delivered to him, until he receives full payment of the sum due under the contract with interest, or until the engagement for which the pledge was given as security, has been fully performed.[1] The mortgagee cannot of course detain the thing for any other debt or claim, than that for which the pledge has been given,[2] as this would be contrary to the terms of the contract. If he detains the pledge for another claim, the Court will compel him to surrender the pledge to the mortgager, leaving him to complain against his debtor for his other claims.

1. Right to detain the property.

When two or more articles have been pledged for one debt, the pawnee is entitled to detain all the articles until the whole debt be paid, because none of the articles were opposed to any specific part of the debt; but if several artic les belonging to one person have been pledged by different agreements, they may be separately redeemed, and the pawnee is not entitled to detain any one article for his other claims.[3]

When two articles have been pledged to one person.

When one article has been pledged to two or more persons for instance, to a joint family, the article is held to be completely pledged to each of the creditors; because the spirit of the agreement is, that the article is held entire and in one pledge. If the mortgagees agree among themselves to alternate possession each of them is a trustee on behalf of the other during the term of possession; and if the pledge be destroyed or damaged, each is responsible according to his respective share. In case the mortgager pays off the debt of either, the article remains *wholly* in pledge with the other, since it was before completely so in the hands of each without a separation.[4]

When one article has been pledged to several individuals.

When two or more persons mortgage or pawn a property to one person for a joint debt by one agreement, the pledge is detained in security for the whole debt, and the mortgagee or pawnee is entitled to detain the whole pledge until the whole debt

When two persons have pledged an article to one individual.

Digitized by Google

be paid; because they pawned the thing together, and he obtained a complete and undivided possession of it. If one of the mortgagers is desirous of redeeming it, he may offer the other partner the option of redeeming it at the same time; and if the copartner be unable or unwilling to do so, he may redeem the whole, and he then becomes a claimant upon his copartner for what has been paid on his account.[5]

1 Hedaya, vol. iv. p. 191. Princ. Mahomedan Law, p. 75, 347.

2 Under the Hindu Law this might perhaps be lawful, see Vrihaspati (Digest, book i. sect. 238). "when a creditor, with an artful design, borrows any thing from his debtor, or withholds a thing deposited by him, or the like, and thus compels payment of the debt, this is called a legal deceit."

3 Hedaya, vol. iv. p. 223.

4 Hedaya, vol. iv. p. 224.

5 Hedaya, vol. iv. p. 225, Arman Pande *versus* Nourutton Koonwur. S. D. A.Rep vol. iii. p.78. Muckun Lal *versus* Wuzeer Ali. Ibid, vol. iv. p. 32. In the last case, the heir to one half of a mortgaged property was allowed to redeem his half share; but the other partner had in this case previously sold the whole property illegally.

2. Bound to take care of the thing.

452. 2 During possession, the mortgagee is bound to pay such attention to the care of the thing as persons of ordinary discretion and prudence give to their own affairs. If he transfers the care of its preservation to any other person than the members of his own family, he becomes responsible for the person to whom he give it in charge.[2]

Expenses for keep and conservation of the pledge by whom to be defrayed.

The expenses requisite for the conservation of the pledge rest therefore upon the mortgagee or pawnee; as, for instance, the rent of the house in which the thing is kept, the wages of Chowkeedars for watching it, &c., but expenses that are requisite for the support of the pledge, and the continuance of its existence lie upon the mortgager, or pawner; as, for instance, the cost of keeping and feeding a horse, or a cow: because though the pawnee is entitled to the possession of the pledge, the pawner is still its owner.[3]

Extraordinary expenses, which are equally as necessary for the conservation of the pledge, as for its existence, for instance, expenses incurred by the sickness, or the like, of the pledge, must be defrayed by both in proportion to the amount of the debt and the excess of the value of the pledge over the debt.[4]

Digitized by Google

1 Colebrooke, Contracts and Obligations, sect. 165.
2 Hedaya, vol. iv. p. 199.
3 Hedaya, vol. iv. p. 200. Princ. Mahomedan Law, p. 74.
4 Hedaya, vol. iv. p. 202.

3. Not entitled to use the pledge unless specially stipulated for.

453. 3. The mortgagee or pawnee is not allowed to use the pledge except this has been specially stipulated for, or is necessary for its preservation; thus, a cow must be milked. He cannot let it out, or give it in loan, because as he has no right to use it himself, he cannot have any right to transfer the use to any other.[1]

Effect of transgressions of the contract by use, &c.

Should the mortgagee use a pledge which was given to be kept only, or commit any other transgression with respect to the pledge, he forfeits the interest of his claim, and must make reparation for all actual loss, because he has broken the terms of the agreement.[2]

1 Hedaya, vol. iv. p. 199. Princ. Mahomedan Law, p. 75.

2 As it is prohibited, under the Mahomedan Law, to take interest, the only effect of transgressing the terms of the contract under that Law is, that he shall make full reparation. Hedaya, vol. iv. p. 199. At present, however, a Mussulman can as legally stipulate for legal interest as a Hindu; (Syad Khadin Ullee *versus* Duljeet Sing, S. D. A. Rep. vol. ii. p. 255) the effect of transgression with respect to the pledge, must therefore now be determined by the rules of the Hindu Law, both for Mussulmans and for Hindoos. See Vishnu, Digest, book i. ch. 1, sect. 78, and 82: "By the use of a pledge to be kept only, the interest is forfeited; and the creditor shall make good the loss of a pledge, unless it was caused by an act of God, or the king, and without his fault." See also Nareda. ibid sect. 83, Yajnyawalcya, ibid, sect. 84.

4. Bound to give damage for the loss, or the deterioration of the pledge.

454. 4. If the pledge be lost or damaged in the hands of the pawnee by his neglect, or by any wilful act, he is responsible for the full value of the pledge;[1] but if it be lost by accident. or by the act of a third party, the pawnee loses the amount of his debt, and the pawner his pledge. Should the value of the pledge however, be less than the debt, the pawnee forfeits that part of his claim only, which is equal to the value of the pledge.[2]

When the pledge has been damaged, the pawner may, according to the opinion of Aboo Huneefah and Aboo Yoosuf, either redeem the pledge by paying the whole of the debt, or relinquish it, and compound with the pawner for its value. But according to the opinion of Mahommed, he may either redeem the pledge by pay-

Digitized by Google

ing the whole debt, or, he may give it to the pawnee in payment of the debt; because as it cannot be redeemed without a compensation, it is, according to his opinion, the same, as if the pledge had been actually lost.[3]

When the pledge is destroyed or damaged by a third party, the pawnee is responsible to the pawner, and the third party to the pawnee; because, though the pawner is the owner, yet the pawnee is entitled to the detention of the pledge, and is therefore also entitled to its substitute, the value.[4]

Should the pledge merely become depreciated in value during the time it was in the pawnee's possession, the pawner must still pay his whole debt;[5] but if it was stipulated, that in case the pledge was not redeemed within a certan time, it should become the property of the pawnee for the debt, the pawner is of course entitled to refuse redeeming it. See Const. No. 898, 5th September, 1834.

1 Hedaya, vol. iv. p. 193. Princ. Mahomedan Law, p. 75. Vyasa, Digest, book i. ch. 1, sect. 85. "If gold or other precious thing, shall be pledged and lost by the negligence of the receiver, that creditor, on the principal and interest of his loan being paid shall be forced to pay the price of the pledge."

2 Hedaya, vol. iv. p 193, 243. Princ. Mahomedan Law, p. 75. Under the Hindu Law, the pawnee does not forfeit his claim, when the pledge is lost or damaged by accident, or the acts of a third party, see Vishnu, Digest, book i. ch. i. sect. 82. "By the use of a pledge to be kept only, the interest is forfeited., and the creditor shall make good the loss of a pledge, unless it was caused by an act of God, or the king, and without his fault." See also Nareda, ibid, sect. 83; Yajnyawalcya, ibid, sect. 84; and Nareda, ibid, sect. 81: "Even so must it be diligently kept: on its loss or destruction by the negligence of the lender, the interest on his loan is forfeited, and even if it be only spoiled or altered."

3 Hedaya, vol. iv. p. 219.

4 Hedaya, vol. iv. p. 243.

5 Hedaya, vol. iv. p. 244.

5. Entitled to transfer his rights.

455. 5. The mortgagee or pawnee may transfer his rights to another person; in other words, he may pledge the thing pledged to him with another person, upon the same terms on which it was pledged to him.[1] He becomes in this case security for the new mortgagee, so that if the thing should be lost or deteriorated in his hands, he will be responsible for the loss to the mortgager, or pawner.[2]

Digitized by Google

The rights of the mortgagee or pawnee in the thing pledged, may of course also be sold in satisfaction of a decree against him. The purchaser then acquires possession of the pledge with the same rights, and under the same obligations, as the original mortgagee. Reg. 7, 1825, Sect. 3, Cl. 7. (Sect. 462).

[1] Hedaya, vol. iv. p. 199. Digest, book ii. ch. 4, sect. 18. "A pledge must be disposed of by the law of pledges, or subject to redemption." Ibid, sect. 27. "A pledge may be transferred by the mortgagee for the same amount, as he has lent thereon."

[2] Hedaya, vol. iv. p. 199.

456. 6. If payment is not made at the time stipulated for in the contract, the mortgagee, or pawnee, is entitled to obtain payment by the sale of the pledge, and has preference of payment over all other creditors of the pawner, except as regard lands, but not over Government for arrears of revenue, nor over proprietors for arrears of rent for the current year. (Sect. 450.)

6. Entitled to obtain payment by means of the pledge in preference over other creditors.

The mortgagee, or pawnee, is not however authorized to sell the pledge himself, except this has been specially agreed to.[1] Like any other creditor, he must sue for payment of his debt, and is even then entitled to cause the pawner to be imprisoned as for another demand, though a pledge has been given; because this is the legal remedy to prevent the pawner's postponing payment by delaying the sale of the pledge.

[1] Hedaya, vol. iv. p. 199, 231. Princ. Mahomedan Law, p. 74. According to the Hindu Law, the pawnee is authorised to sell the pledge, when the debt has been doubled by interest, see Vrihaspati, Digest, book ii. ch. 1. sect. 8, 9. "After the time for payment has past, and when interest ceases, the creditor shall be owner of the pledge." "When the debt is doubled by the interest, and the debtor is either dead or has absconded, the creditor may take his pledge, and sell it before witnesses."

[2] Hedaya, vol. ii. p. 624, vol. iv. p. 194.

9. *On the Rights and Obligations of the Mortgager, or Pawner.*

457. 1. The mortgager or pawner is entitled to redeem the pledge at the time stipulated in the contract, or, if no time has been stipulated, at any time most convenient to him, by payment of the debt, or by fulfilment of any other engagement for the performance of which the pledge was given.

Rights and obligations of the mortgager, or pawner.
1. Entitled to redeem the pledge.

Digitized by Google

The redemption must be effected in strict accordance with the contract; if two or more articles have been pledged for one debt, or other engagement; or if one article has been pledged to two or more individuals; a part of the pledge cannot be redeemed separately without the consent of the pawnee, or pawnees. If two persons have pledged property by one agreement to one individual, one of them cannot redeem part of the pledge by paying a proportional part of the debt, without the consent of the pawnee. (Sect. 451.)

2. Not entitled to use the pledge, or to get it returned for selling it.

458. 2. He is not entitled to make any use of the pledge during the time it remains in the possession of the pawnee, unless this has been specially stipulated for; for instance, he is not entitled to milk a cow, which has been pledged, or the like;[1] neither is he entitled to demand the restoration of the pledge with a view of selling it, and thereby pay off his debt, as it follows from the nature of the contract, that the pawnee is entitled to detain the pledge until he is paid.[2]

1 Hedaya, vol. iv. p. 192.

2 Hedaya, vol. iv. p. 198.

3. Bound to pay expenses for preserving the pledge.

459. 3. He is bound to pay all regular expenses which have been incurred by the pawnee to preserve the existence of the pledge; as, expenses for the keep and feeding of a horse pledged, and the like. Extraordinary expenses, equally necessary for the preservation of the pledge with the pawnee, and for its existence, such as, expenses incurred by the sickness, or the like, of the pledge, must be defrayed by both parties in proportion to the amount of the debt, and the excess of the value of the pledge over the debt. (Sect. 452.)

4. Entitled to damages on the loss of the pledge;

460. 4. He is entitled to recover damages from the mortgagee, or pawnee, to the full amount of his loss, when the pledge has been lost or deteriorated in the possession of the mortgagee, or pawnee, by any wilful act, or by the neglect of the mortgagee, or pawnee. If the pledge has been lost in his hands by accident, or by the act of a third party, the mortgager becomes released from the whole debt, in case the value of the pledge exceeded the amount of the debt, or, if the value was less, for a part of it in proportion to the value of the pledge. (Sect. 454.)

Digitized by Google

When the mortgagee, or pawnee, has used the pledge without the consent of the pawner, he is not bound to pay any interest on his debt. (Sect. 453.)

or the use of it.

461. 5. He is not entitled to sell the thing without the consent of the mortgagee, or pawnee; if he sells it without his consent, the sale does not become invalid, but remains suspended. If the debt be due at the time, the purchaser must pay the debt and redeem the property, and the sale then becomes effective; if the debt is not due at the time, and the mortgagee or pawnee does not consent to receive payment, or to accept the purchaser as his debtor, the sale becomes suspended until the debt is due, and the property can be redeemed. If the pawnee consent to accept the purchaser as his debtor in lieu of the original mortgager, the sale becomes effective; the original pawner is released from all obligation, and the purchaser becomes the pawner, to all intents and purposes, under the terms of the original contract.[1]

5. Not entitled to sell the pledge without the consent of the other party.

A property mortgaged or powned may be sold at auction in execution of a decree, and the purchaser of the property stands in the place of the original mortgager, and acquires all his rights and obligations. Reg. 7, 1825, Sect. 3, Cl. 7. Const. No. 856, 24th January, 1834, Par. 2. Cir. Order, 4th September, 1840. Cir. Order, 10th June, 1842, (Sect. 281.) The mortgagee is not of course bound to accept the purchaser as his debtor in lieu of the original mortgager, because he has entered into no contract with him. If he agrees to allow his claim to remain as a debt of the purchaser, (and his consent is implied, if he makes no objection at the time of the sale,) the original mortgager is released, and the purchaser becomes the debtor tnd mortgager under the original mortgage; but if he objects to allow his claim to remain as a debt of the purchaser, he must sue mortgager for his demand, (Sect. 456) and even if the debt should not be due at the time according to the terms of the mortgage, the mortgagee is entitled to immediate payment; because the respite which has been stipulated for, was granted in consideration of the apparent pecuniary circumstances of the mortgager at the time the agree-

But the property may be sold by auction in execution of a decree, when mortgagee becomes entitled to instant payment.

Digitized by Google

ment was made, (Sect. 395) and the conditions of the mortgage viz., that the property should remain iu the hands of the mortgagee, or the mortgager, as security for his demand, have been violated by the sale which has taken place on accont of the legal claims of another party.

1 Hedaya, vol. iv. p. 231, 237. Princ. Mahomedan Law, p. 175. Princ. Hindu Law, vol. ii. p. 307. Muhammud Muthir Kha *versus* Syud Abdul Hakim. S. D. A. Rep. vol. v. p. 226.

10. *On the Effect of a Mortgage or Pawn.*

Effect of a mortgage or pawn.

462. The principal effect of a pawn, and of a mortgage by which possession of the property mortgaged has been given to the mortgagee, is, that the pawnee or mortgagee is entitled to detain the thing in his possession until the contract be fulfilled, and in case of non-fulfilment of the contract, is entitled to payment, in conformity with the terms of the contract, by the sale of the property pledged, in preference to all other creditors of the pawner or mortgager. The principal effect of a mortgage under which possession of the property mortgaged has not been given to the mortgagee, is merely, that in case of non-fulfilment of the contract, the mortgagee is entitled to payment, in conformity with the terms of the contract, by the sale of the property mortgaged, in preference to all other creditors of the mortgager. The mortgagee is not entitled to enter upon possession of the property to secure the ultimate payment of his claim, if this has not been specially stipulated for in the contract.

On the effect of a usufructuary mortgage, see Sect. 439 ; and on the effect of a mortgage and conditional sale, see Sect. 442.

When the property belongs to another person or has been previously pledged.

463. when property has been pawned or mortgaged, and another person proves his prior right to it as owner or mortgagee, the mortgage or pawn becomes invalid ; but the principal contract, viz., the debt according to the bond, or other agreement, is not affected thereby, except, that if respite for payment was granted, the debt will become due immediately, as the debtor has not fulfilled the conditions of the contract.

Moveable property once pawned cannot be legally pawned a

Digitized by Google

second time, as possession cannot be given to the subsequent pawnee, and no pawn can consequently be established. (Sect. 432.) But if a second pawn be effected by some fraudulent act of the pawner; for instance, if he took away the thing from the pawnee, and then pawned it with some other person; the second pawn would be invalid through the fraud of the pawner. The same would be the effect if the pawner obtained the thing from the pawnee as a loan, for temporary use; as the pawner, in this case, obtained possession of the thing, not as owner, but as lender.[1]

When immoveable property has been mortgaged to two separate persons, as when possession of the property has been given to one, and possession of the title deeds to another, or, when property has been mortgaged to one, and sold or given to another, the prior mortgage or alienation has preference over the latter,[2] but the mortgagee, who has caused his title deeds to be registered has perference over the party who has not registered them, whether they were executed prior, or subsequent, to the registered deed. Reg. 19, 1843, Sect. 1, 2.

[1] Hedaya, vol. iv. p. 246.

[2] Mitacshara, Princ. Hindu law, vol. i. p. 200.

When the mortgage or pawn is partly valid, partly invalid.

464. When the mortgage or pawn is only partly invalid, the contract still subsists with respect to the remaining part, but a proportional part of the debt becomes immediately due by the pawnee. For instance, if a man borrows 100 Rupees, pledging valuables as security for the payment to the amount of 120 Rupees, and a part of it of the value of 20 Rupees be proved to belong to another person; the pawner is bound to deliver other valuables as security for the debt of the same proportional value, viz., one-sixth part of the actual value of the things originally pledged. If he dose not give that security, the pawnee may demand and enforce instant payment of the whole debt, and recover it by the sale of the pledge as far as it goes; because the conditions of the contract have been infringed.

In case the portion which remains after another person has proved his right to a part of the pledge, be of such a nature, that

Digitized by Google

it cannot be separately pawned, for instance, if it be proved, that another person has a right to half the property pledged, the whole pawn becomes annulled.

Hedaya, vol. iv. p. 206.

Property pledged, when to be sold in execution of a decree.

465. It has been observed, that the mortgage or pawn of property does not prevent the interest of the mortgager in the property, beyond the right and interest of the mortgagee, from being sold in satisfaction of other legal demands against him ; and that in case the mortgagee is unwilling to allow his claim to remain as a debt of the purchaser, he may, when this happens, immediately demand and enforce payment. (Sect. 461). When however it is apparent, or has been substantially proved, that the property mortgaged is insufficient to satisfy the legal claim of the mortgagee, and no surplus consequently can be obtained by the sale of it, it is evident, that the other creditors cannot cause the property to be sold, as it would be no benefit to them, and might be injurious to the mortgagee.

The decreeholder stands in the place of the seller and guarantees the defendant's title as stated by him.

In a sale in satisfaction of a decree of Court, the decreeholder stands in every respect in the place of the seller. It is he who enforces the sale, and who is bound to give the requisite information about the property which is to be sold. It is according to his statement and request, that the conditions of the sale are to be framed. Reg. 26, 1814, Sect. 15. The Court merely causes the property to be sold under the forms established by law, (Reg. 7, 1825,) on his responsibility, without instituting any inquiry about the title or rights of the alleged proprietor. If the decreeholder causes property to be sold belonging to another person not the defendant in the case, or sells a greater portion of property than belongs to him, or property with greater rights than belong to it, or without specifying its encumbrances, if any there be, he is responsible to the purchaser. The general condition, " that nothing is guaranteed to the purchaser beyond the actual right and interest of the party whose property is sold" refers only to the authority who sells it, not to the decreeholder who causes it to be sold.[1] The purchaser, whose purchase becomes wholly or partly

Digitized by Google

invalid, or who does not obtain the property as described in the conditions of sale, may cancel the sale and recover the price or damages from the decreeholder, as from another seller. Reg. 7, 1825, Sect. 3, Cl. 4.

[1] The Circular Order of 4th September, 1840, must be understood in accordance herewith. It is said in the 2nd Para. of this Order; "it has been recently ruled by the Court, that the summary investigation often made into the claims of a mortgagee, who may assert a prior mortgage on such property, is irregular and superogatory; *the defendant's right and interest in the property being alone sold*, with the incumbrance of any prior mortgage, and the law providing, that bidders at such sales be clearly apprized, that nothing is guaranteed to them in the land or other property sold beyond such right and interest."

It cannot be the Court's opinion that a property to be sold at the request of a decreeholder, is to be put up for sale without any description of its nature, its rights and liabilities, simply on the general condition, "that the defendant's right, and interest in the property, whatever they may be" is sold, as this would be an absurdity. For instance, if A. a decreeholder demands that property worth 20,000 Rupees be sold, and B, as mortgagee according to bond, claims 16,000 Rupees, the property would then be sold on the condition, that the rights and interest of the defendant in the property, whatever they might be, should be sold. The effect of such a condition would be, that if the bidders believed the mortgagee's claim to be valid, the property would fetch, say 4000 Rupees, the real value of the owner's interest in the property, and that, if the mortgager was afterwards unable to substantiate his claim, the purchaser would have acquired a property worth 20,000 Rupees for the small sum of 4000 Rupees, which would be equally as injurious to the decreeholders, as to the proprietor of the property; or, that if the bidders should believe the mortgagee's claim to be unfounded, the purchaser might buy the property for say 16,000 Rupees, and afterwards, on the mortgagee's proving his legal claim, have to pay an additional sum of 16,000 Rupees to him, or lose the property, and thus have to pay 12,000 Rupees more for the property than its real value. Or, suppose that several properties situated in different jurisdictions had been mortgaged for 3000 Rupees, and that a decreeholder requested any of these properties to be sold, and a small property worth 100 Rupees situated in another jurisdiction was to be sold with the reservation of the mortgagee's rights, in this case, to effect a sale on such a condition would of course be an impossibility, as nobody could think of buying a property worth 100 Rupees, subject to a claim of an indefinite part of 3,000 Rupees.

The meaning or the Circular Order seems only to be, that *the Court* which orders the sale guarantees nothing to the purchaser beyond the actual right and interest of the defendant, and that the Court is not *summarily* to decide the rights and the claims of mortgagees and others, which can only be done by a regular suit, but is merely, summarily to inquire whether the sale, according to the apparent claims and objections, can legally take place or not. See Reg. 7, 1825, Sect. 4, Cl. 5.

Digitized by Google

Mortgagee objecting to the sale how to proceed.

466. When a decreeholder applies for the sale of a property the property is, as above stated, to be put up for unreserved sale in conformity with his request and as described by him. If the property is previously mortgage, and the mortgagee appears and objects to the sale, he is to file his objections in the Court which ordered the sale; and if he is able to substantiate, by a summary inquiry, that the property is mortgaged to him for an amount exceeding its real value, and that no surplus will consequently be left to satisfy the demand of the decreeholder, the Court will countermand the sale, (Sect. 465.) If the Court rejects his claim, the sale must be postponed for three months, from the date of the order of the Judge, to allow the claimant time for appeal. Const. No. 1027, 29th (15th) July, 1836, Par. 2.

When mortgagee only claims preferable payment.

467. When the mortgagee has no objection to the sale, but merely claims preferable payment in conformity with the mortgage-deed, and his claim has either been recognized by a decree of Court, or is acknowledged by the decreeholder, as well as by the debtor, the mortgagee will first receive payment from the proceeds of the sale, and the decreeholder will receive from the surplus. There is in the last case no reason or cause for instituting a suit, as there is no dispute.

And claim is disputed.

If the mortgagee has not obtained a decree, and the amount of his claim, or his right under the deed, are disputed, bnt a surplus for the payment of the decreeholder may be expected from the sale, the Court will order the sale to take place, and the mortgagee to prove his demand and right by a regular suit. In case the mortgagee files a regular suit within thirty days after the date of the sale, the sale-proceeds will be kept in deposit until his claim is decided. If his claim is rejected, the sale-proceeds will be kept in deposit for three months from the date of the order of the Judge, to allow the claimant time for appeal. Const. No. 1027, 29th (15th) July, 1836, Paras. 3, 4.

And the mortgage-deed is unregistered.

Should the mortgagee not prefer his claim within thirty days after the date of the sale, the sale-proceeds will be paid to the decreeholder, Const. No. 1027, 29th (15th) July, 1836. Para. 4, and if the mortgage-deed is unregistered, the purchaser of the

Digitized by Google

property mortgaged will, by causing his title deeds to be registered, exclude him from all claim upon the property, Reg. 36, 1793, Sect. 6. Reg. 19, 1843, Sect. 2. The mortgagee's personal claim on his debtor for whatever may be justly due to him is of course not affected by the sale.

When the mortgage deed has been registered, the mortgagee is not bound to come forward and claim payment within the thirty days after the date of the sale. If he holds possession of the property mortgaged, he may at any subsequent time, even after the lapse of twelve years from the date of the mortgage, demand and enforce payment by realization of the property mortgaged. Reg. 2, 1805, Sect. 3, Cl. 4. On proof of his demand, the sale will become cancelled, and the purchaser may recover from the decreeholder. But if the mortgagee has not possession of the property, his right to demand payment by the sale of the property will lapse at the expiration of twelve years from the date of the sale, and the purchaser's title will then become unimpeachable. Reg. 2, 1805, Sect. 2. When registered.

468. If the amount of the mortgagee's claim is undetermined at the time, as for instance, if the property is pledged as security from the fulfilment of an engagement, and it be yet undetermined whether any, or what amount, may ultimately become due by the mortgager under the engagement, it seems, that a decree holder is still entitled to have the property sold, and that the Court, at its discretion, can order the mortgagee to settle the accounts under the engagement as early as possible, and either postpone the sale until the engagement can be closed, or order the sale to take place and keep the sale-proceeds in deposit, until the accounts are settled and the rights of the mortgagee are finally determined; otherwise a person mortgaging his property under an indefinite engagement, such as security for the fulfilment of the duties of an office, might be enabled to deprive his creditors of their just due, if the party who had trusted him with the office chose not to discharge him. When the amount of the mortgagee's claim is undetermined at the time of the sale.

If the mortgage is determinable only on the occurrence of a certain event, and cannot be determined before that event occurs When only determinable at the occurrence

Digitized by Google

of a certain event.

without the detriment of the mortgagee, the right of other creditors remains suspended until that event occurs. For instance, if the property has been mortgaged as security for the payment of an annuity, other creditors may attach the property to secure their interest, but cannot cause it to be sold before the event occurs, and the mortgagee's right ceases. Should, however, the value of the property mortgaged proportionally exceed the payment assured, the Court may order the property to be sold, and the rights of the annuitant to be secured in some other way; because the sale, and an alteration of the security, is no injury to the annuitant, but the continuance of the mortgage would be an injury to the other parties.

Right of the mortgagee, when ceases: not by prescription when the mortgagee or pawnee has actual possession.

469. The rights of the mortgagee ceases in the same manner as other contracts, by payment, liberation, and so forth.[1] It does not cease by prescription, in case the mortgagee has actual possession of the pledge; but if he has only possession of the title deeds, his right will lapse at the expiration of twelve years from the date of the mortgage. Reg. 2, 1805, Sect. 2 and 3, Cl. 4. The right of a pawnee to payment by means of the pledge, is not affected by lapse of time. Const. No. 965, 7th July, 1835.

[1] Colebrooke, Contracts and Obligations, Sect. 293, seq.

Digitized by Google

APPENDIX.

Sect. 2, Note 2. See also Hedaya, vol. ii. p. 544 : " The prophet has said : be regardful of Zimmees (infidel subject of the Mussulman Government,) for they are entitled to the same rights, and subject to the same rules with Mussulmans."

Sect. 54 and 242. Officers appointed, under the 128th and 129th Articles of War for Her Majesty's Forces, and under the 110th and 111th Articles of War for the East India Company's Forces, to collect the effects of officers and soldiers, are empowered to collect all personal property in camp or quarters of commissioned officers, and there and elsewhere of non-commissioned officers and soldiers, without reference to its amount. Such officers may receive Government securities belonging to a soldier, not being a commissioned officer, and may legally endorse them, as if he had been appointed executor, or obtained letters of administration. The interference of the Registrar of the Supereme Court by taking out letters of administration is only required in the case of an officer or soldier in the Queen's service for effects found elsewhere than in camp or quarters ; and cannot take place without a requisition from such appointed officer. Court of Directors' letter to the Governor General in Council, 5th July, 1843, (containing a legal opinion on the powers granted by the Articles of War.)

Sect. 65. An executor or administrator can now pay the legacy of a minor or a lunatic, to the official trustee appointed under Act 17, of 1843. See this Act, Sect. 5.

Sect. 245, see Sect. 450. The proprietor of lands is entitled to preference only in the crop growing or grown on the lands, not in other property, except on the strength of analogy, in buildings or houses erected on the ground for rent due for the current year.

Sect. 338, No. 3, see further Sect. 458.

Sect. 382, see further Sect. 465.

Digitized by Google

INDEX.

Abominable sale, what so termed under the Mahomedan Law, Sect. 419.

Aboo Huneefa, one of the Doctors of the Mahomedan Law, 16, 17.

Aboo Yoosuf, one of the disciples of Aboo Huneefa, 17.

Absent heir, duties of the Judge when no heir appears to an estate, 52; heir, when considered to be dead on account of absence, 82; estate, how to be divided when one of the heirs is absent, according to the Mahomedan Law, 136; according to the Hindu Law, 193.

Acknowledgment of kindred, establishes the right of inheritance under the Mahomedan Law, 93.

Acquisition separate, by a co-sharer under the Hindu Law, effect of, 202.

Acts of partners, how far binding on each other under the Hindu Law, 191.

Administrator, when appointed, 72. By whom appointed, 73. Duties of, 75.

Adopted son, inherits under the Hindu Law, 159; not under the Mahomedan Law, 294.

Adoption, Hindu Law of, 34.

Agent, cannot purchase goods, given him for sale, when no price has been fixed, 335.

Ameens, sales conducted by, 377, 385—9; entitled to remuneration, 390.

Ancestral land, the recovering heirs share of, under the Hindu Law, 203.

Ancestral property; no distinction between ancestral and self-acquired property, as regards inheritance under the Mahomedan Law, 89; but under the Hindu Law, 154, and English Law,

Digitized by Google

220, 221 ; cannot be divided in unequal shares by father under the Hindu Law, 264, 265 ; but under the English Law, 300, 319 ; cannot be given away by the father under the Hindu Law, without the consent of the sons, 273 ; can be sold, 337, No. 2.

Anchorite, heirs to, under the Hindu Law, 181.

Annulment, of an auction sale of estates sold for arrears of revenue, 352, 357, 411.—of Putnee Talooks sold for arrears of rent, 365.—of property sold in execution of decrees, 385, 389. —of a private sale on account of the right of pre-emption, 412.

Apostacy, from the Mahomedan and Hindu religion does not exclude from inheritance, 131, 188.

Appraisers, of distrained property, cannot buy such property at auction sales, 335.

Ascetics, are excluded from inheriting under the Hindu Law, 189.

Attachment, right obtained by, 245, 450.

Auction sales, 343 to 390 ; no public officer empowered to conduct auction sales at the request of private individuals, 343.

Aunts, right of inheritance under the Mahomedan Law, 121, No. 4, under the English Law, 220, 232 ; no right under the Hindu Law, 152.

Augmentations, to property, effect of, in a cancelled sale, 421.

Barren daughters, do not inherit under the Hindu Law, 170.

Bastard, see Illegitimate issue.

Benares school, of the Hindu Law, works followed by, 30.

Bengal code, what is so called, 12, 36.

Bengal school, of the Hindu Law, works followed by, 29 ; order of succession under, 156 seq.

Blindness, excludes from inheritance under the Hindu Law, 189.

British European Subjects, who are such, 54 ; duties of the Judge relative to their estates, 54, and Appendix ; may be managers of native estates, 72 ; succession to their estates, how regulated, 81 ; debts to them, how recovered, 243.

Brother, right of inheritance under the Mahomedan Law ; full brother, 109 ; half brother, 112, 119 ; under the Hindu Law,

Digitized by Google

175; under the English Law, to real estate, 220; to personal estate, 230.

Brother's daughter, right of inheritance under the Mahomedan Law, 121, No. 3; under the English Law, to real estate, 220; to personal estate, 230; no right under the Hindu Law, 152.

Brother's grandson, right of inheritance under the Mahomedan Law, 119; under the Hindu Law, 177; under the English Law, to real estate, 220; to personal estate, 231.

Brother's son, right of inheritance under the Mahomedan Law, 119, 121, No. 3; under the Hindu Law, 176; under the English Law, to real estate, 220; to personal estate, 230.

Bunkur, what it is, 396.

Bye-bil-wuffa, what it is, 321, Note 4, 442; right under, 443 to 448.

Cauzy, cannot purchase articles at sales held by him, 335.

Certificate, to recover debts due to estates, when required, 239; how obtained, 239, 240; authority under, 241.

Charters of the East India Company, 5 to 8.

Chastity, of a widow, is requsite to her inheriting under the Hindu Law, 167.

Chelas, heirs to devotees under the Hindu Law, 182.

Choses in action, what are so called under the English Law, 214.

Circular Orders, authority of, 39.

Civil Officers, when to report sales of their private property, 335.

Codicil, what is so called, 292; how it is to be executed, 306.

Colebrooke's Digest, what it is, 26.

Collector, sales conducted by; for arrears of revenue, 346; of Putnee Talooks, 359; of saleable tenures, 367; of lands in execution of decrees, 377, 378.

Company East India, 5 to 8.

Concealment of effects, on partition among heirs; effect of, under the Hindu Law, 209.

Conditional Gifts, invalid under the Mahomedan Law, 259, 286.

Conditional Sales, are valid, 331; rules regarding, under the Mahomedan Law, 332, 333; Mortgage and conditional sale, effect of, 443 to 448.

Digitized by Google

Constructions, of the Sudder Dewanny Adawlut, authority of, 38.

Cost of sale, for sale of Putnee Talooks, 366 ; of personal property for arrears of rent, 376 ; in execution of decrees, 384, 390.

Creditor, may be witness to a will under the English Law, 302 ; all creditors have generally an equal right against their debtors ; exceptions, 245, 450.

Curator, by whom appointed, 47, 76 ; powers of, 78, 334 ; remuneration for acting, 79.

Custom or usage, validity of, 40 to 43 ; how to be proved, 44.

Dattoca Chandrica, a Hindu Law book on adoption, 34.

Dattaca Mimansa, a Hindu Law book on adoption, 34.

Daughter, right of inheritance under the Mahomedan Law, 100 ; under the Hindu Law, 151, No. 2, 168 to 171 ; barren and widowed daughter takes no share, 168 ; right under the English Law, to real estate, 218 ; to personal estate, 226 ; obliged to bring in what she has received as an advance under the English Law ; power over property inherited under the Hindu Law, 151, 171 ; right to a marriage portion on partition under the Hindu Law, 199.

Daughter's son, right of inheritance under the Mahomedan Law, 121 ; under the Hindu Law, 172 ; under the English Law, 218, 232.

Daya Bhaga, a Hindu Law book, 26, 29.

Daya Crama Sangraha, a Hindu Law book, 26, 29.

Daya Tatwa, a Hindu Law book, 29.

Deafness, excludes from inheritance under the Hindu Law, 189.

Death-bed, gift on, under the Mahomedan Law, 262 ; sale on, 334 ; acknowledgment of debt on, 245, 450.

Death civil, what, under the Hindu Law, 82, note 1.

Death presumed, when, 82.

Debts, by co-partners to be paid on division, 194.—of deceased persons, to be paid, 238.—to deceased persons, how to be recovered, 238 ; when a certificate is required, 239 ; debts, how to be paid, 245 ; under the English Law, 246 ; when, 247 ;

Digitized by Google

Creditors cannot be forced to appear, 248 ; Debts, when due, 249 ; Effect, when unpaid, on distribution, 250 ; who are liable for debts under the Hindu Law, 251.

Deccan school, of the Hindu Law, authorities followed by, 32.

Defaulter, cannot buy his own property distrained for rent, 335 ; can buy his estate sold for arrears of revenue, 335.

Delivery, necessary to the validity of a gift under the Mahomedan Law, 258 ; not under the Hindu Law, 261 ; not necessary to the validity of a sale, 330 ; how, where, and when to be made, 392 to 398.

Deputy Collector, cannot buy lands sold for arrears of revenue, 335.

Deterioration, of property sold, damages for, 421.

Devotee, heirs to a, under the Hindu Law, 181.

Dhurma Shaster, contents of, 22.

Disinherison, causes of, under the Mahomedan Law, 88 ; under the Hindu Law, 153.

Distant kindred, who are so called, under the Mahomedan Law, 90, 121 to 125.

Distrainer, of property for rent, cannot buy such property, 335.

Distribution, see Partition.

Division, see Partition.

Divisible property, gifts of a part of, not valid without prior division under the Mahomedan Law, 276 ; but valid under the Hindu Law, 278 ; disposing wills of a part of, valid without prior division, 312.

Donee, not accountable for mesne profits, 291.

Donor, not bound to warranty, 290.

Dower, wife's right to, under the English Law, 216 ; is not a gift under the Mahomedan Law, 256.

Dumbness, excludes from inheriting under the Hindu Law, 189.

Dwaita parisishta, a Hindu Law book, 31.

Dwapara Yuga, the third age of the world, 24.

Effect, of gifts, 286, seq. ; of wills, 309, seq. ; of sales, 391, seq. ; of mortgage and pawn, 451, seq.

Elder widow, her right on inheriting under the Hindu Law, 163.

Digitized by Google

Emancipator, inherits a freedman under the Mahomedan Law, 120.

Endowments, religious, profit of, how inherited under the Mahomedan Law, 137 ; under the Hindu Law, 205, 206. Property belonging to, not subject matters of gifts, or sale, except the endowment was only nominal, 205, 270, 337, No. 4. Management of, how far inheritable under the Mahomedan Law, 138, under the Hindu Law, 205, 206.

English Law, valid only among British subjects, 7, 11.

Escheat, for want of heirs, 52, 95.

Estates, how to be sold for arrears of revenue, 343, seq. In execution of decrees, 377, seq.

Executors, who appoint them, 55 ; who can be appointed, 56. Joint executors, 58, 59 ; duties of, 60, seq. ; may sell and mortgage property belonging to the estate, 68, 334, 436 ; complaints against, how to be made, 70 ; not entitled to any remuneration, 71 ; may be witnessed to the will under the English Law, 302 ; must be appointed to execute the will, 303 ; when entitled to the residue under the English Law, 324 ; cannot buy property from the estate, 335.

False grandfather, and grandmother, who are so called under the Mahomedan Law, 96 ; their share of the inheritance, 105, 118, 121.

Family, Head of, when answerable for the debts of the family, 254.

Father, right of inheritance under the Mahomedan Law, 104, 118 ; under the Hindu Law, 173 ; under the English Law, of real estate, 220 ; of personal estate, 229 ; his right of making gifts, 263 to 268, 287 ; not responsible for his son's debts, 254.

Felon, cannot make a will under the English Law, 296.

Females, right of inheritance, under the Mahomedan Law, 89 ; under the Hindu Law, 152, 165, 166 ; under the English Law, 213, 226. Of privileges and offices under the Hindu Law, 206, 207. Their power over inherited property, 89, 152, 262, 337, No. 3.

Fictitious name, purchase in, rights vest in the real owner, 334 ; how to be proved, 334.

Digitized by Google

Fixtures, what are so called, 396, 212.

Form, of a gift, 285 ; of a will, 299 ; of a sale, 340 ; of a mortgage or pawn, 348.

Foundation, of inheritance under the Mahomedan Law, 80, 87 ; under the Hindu Law, 149 ; under the English Law, 211.

Funeral expenses, are to be paid before debts, 243.

Future things, gifts of, 271 ; wills of, 312 ; sales of, 327.

Futwa-i-Alumgeree, a Mahomedan Law book, 20.

Gallant, responsible for the debts of his concubine's husband under the Hindu Law, 255.

General legacy, effect of, 322.

Gifts, what are so called, 256, 326. Requisites of, 257, 258, 261 ; who can make them, 262. Gifts to relatives 263, 287. By father to children under the Hindu Law, 264 to 268 ; under the English Law, 227. Who can receive gifts, 269. What may be subject matter of gifts, 270. Gifts of joint property, 270 ; of future things, 271 ; of things not in possession, 272 ; of ancestral property, 273 ; of joint and divisible property, 274 to 281. Pious gifts, 282 to 284 ; form of, 285 ; interpretation of, 285 ; effect of, 286, 287. Gifts partially valid, 289. Donor not bound to warranty, 280. Donee not accountable for mesne profit, 291. Gifts on death-bed, 245 ; under the Mahomedan Law, 260, 313 ; under the English Law, 305.

Gossians, Devotees, who inherit, under the Hindu Law, 182.

Grandfather, true, who is so called under the Mahomedan Law, 96 ; Share of inheritance under the Mahomedan Law, 105, 118 ; of the false grandfather, 121 ; under the Hindu Law, 179 ; under the English Law, 220, 231.

Grandmother, true, who is so called under the Mahomedan Law, 108 ; share of inheritance under the Mahomedan Law, 108 ; under the Hindu Law, 152, No. 4 ; under the English Law, 220, 231 ; entitled to a share on partition by husband among grandsons, 268, 193 ; entitled to maintenance, 208.

Grandson, right of inheritance under the Mahomedan Law, 117 ; under the Hindu Law, 158, 161, 162 ; under the English Law, of real estate, 218 ; of personal estate, 228.

Digitized by Google

Great-grandfather, right of inheritance under the Mahomedan Law, 118, 123 ; under the Hindu Law, 179 ; under the English Law, 220, 232.

Great-grandmother, right of inheritance under the Mahomedan Law, 118, 123 ; under the Hindu Law, 179 ; under the English Law, 220, 232.

Guardian, cannot purchase property belonging to his ward, 335 ; can renounce the right of pre-emption, 416 ; can contract a mortgage, 436 ; and sale, 68, 334.

Half-brother, see brother.

Hedaya, a Mahomedan Law book, 19.

Heir, must prove that he is the heir, 85 ; cannot sell his inheritance in expectance, 237, 271, 337, No. 5.

Hermit, is excluded from inheriting under the Hindu Law, 189 ; descent of property from, 181.

Hiba-bil-Iwuz, what is so called, 256, 326.

Hindu Law, when antiquated, 2 ; when revived, 9, 10 ; contents of, 22 to 35 ; causes of obscurity in, 27 ; different schools of, 28 ; to be expounded by the law officers, 35. Hindu Law of inheritance, foundation of, 149.

Hindoo, co-habiting with a Mahomedan woman, 151 ; ill-treating parents, 153.

Hindu Sages, names of, 23.

Homicide, excludes from inheritance under the Mahomedan Law, 131.

Husband, right of inheritance, under the Mahomedan Law, 98 ; under the Hindu Law, 186 ; under the English Law, 213, seq., 225. Power over his wife's property, 67, 262, 334 ; under the English Law, 67, 141, 213 ; not generally responsible for his wife's debts, 254.

Juganatha Tuckapunchanun, compiler of the Digest of the Hindu Law, 26.

Idiots, excluded from inheritance under the Hindu Law, 188.

Idols, are not divided on partition among cosharers under the Hindu Law, 198, 205.

Digitized by Google

Jheel, what is so called, 396.

Jimuta Vahana, a Hindu lawyer, 26.

Illegitimate issue, inherits only mother and mother's kindered under the Mahomedan Law, 89; inherits only among Sudras under the Hindu Law, 160; inherits from nobody under the English Law, 219.

Imam Mahomed, one of the disciples of Aboo Huneefah, 17.

Impediments, to inheritance, what they are, under the Mahomedan Law, 131, 147; under the Hindu Law, 151, 189.

Impotence, excludes from inheritance under the Hindu Law, 189.

Improper sales, what are so called under the Mahomedan Law, 419.

Increase of estate, after the death of the inheritee, goes to the estate under the Mahomedan Law, 132; under the Hindu Law, 191.

Indigo Planter, his right to plant for which advances have been given, 450.

Indivisible property, gifts of, under the Mahomedan Law, 277; under the Hindu Law, 278.

Infants, see Minors.

Inheritance, foundation of, 80; by what law regulated, 81; requisites of, 82; how distributed when the inheritee and the heir die at the same time, 83.

Inheritance; under the Mahomedan Law, 87 to 138; foundation of, 87. Heirs cannot be disinherited, 88. Peculiarities of the Mahomedan Law of inheritance, 89. Order of succession, 90 to 95. On sharers, 96 to 112; residuaries, 113 to 120; and distant kindered 121 to 127. On the return, 90, 128, 129, and deficiency, 130. Impediments to inheritance, 131. *distribution of the estate*, 132, 133; when one heir compounds with another, 134; when the widow is pregnant, 135; when the heir is missing, 136. Division of profit of endowments, 137. Office of Mootwulee, 138. Inheritance, according to the sect of the Shiites 139 to 144. On the return and deficiency, 145, 146. Impediments to inheritance, 147. Right of primogeniture. 148

Under the Hindu Law, foundation of, 149; peculiarities of,

Digitized by Google

150, 151. Females are generally excluded, 152. Heirs cannot be disinherited without cause, 153. Ancestorial and self-acquired property is inherited in the same manner, 154. Order of succession, according to the Bengal school, 156 to 179; according to the Benares and Mithila school, 180. Succession to the property of a devotee, 181. Succession to a woman's property; Streedhun, 183 to 187. Impediments to inheritance, 188 to 190. *Partition of the estate,* 191 to 210; who can demand partition, 192; when it can take place, 193; how it is to be made, 194, seq. Self-acquisitions to be separated, 196, and gifts to a sharer, 197. What things are not to be divided, 198. Division among sons, 199; among brothers during father's lifetime, 200; and when father has made a distribution during his lifetime, 201. Acquisitions by means of the joint fund, 202. Recovered ancestorial property, 203. Expenditure for the sole benefit of a sharer, 204. Partition of privileges and rights; endowed property cannot be divided, but the profit can, except the endowment was nominal, 205. Right to perform ceremonies not heritable by females, 206. What offices are heritable, 207. Maintenance, to females 208. Partition of property found after division, 209. Partition how to be made and ascertained, 210.

Under the English Law, foundation of succession, 211. Real and personal estate, what is so called, 212. Succession by husband and wife, 213 to 217. Husband's right to the personal estate, 213, 214; to the real estate, 215. Wife's right to the personal estate, paraphernalia, dower, jointure, 216; and her own property, 217. Succession to real estate, 218 to 223; to personal estate, 224 to 232.

Under the Portuguese Law, 233.

Rights and obligations of the representatives to a deceased person, 234 to 255. Representatives, who are, 234, 235; rights of, 236. Heir may renounce his rights, 237. Representative may recover debts; a certificate, when required, 238; how obtained and contested, 239, 240; effect of 241. British subjects must have probate or letters of administration, 242, and Appendix. *Payment of debts,* 243. Inventory when required,

Digitized by Google

244. Who are entitled to preferable payment, 245, 246. Gifts on death-bed, 245. Debts when to be paid, 247, 248 ; when due 249. Effect, when unpaid on partition, 250. Under the Hindu Law, sons and grandson always liable for debts, 251, 253 ; when they are minors, 252. Husband, wife, father and mother not generally liable, 254. Wife and mother, when liable ; heirs of husband, when liable for widow's debts ; protector and gallant for husband's debt, 255.

Initiation, must be performed at the charge of the joint estate 199.

Insolvency, dissolves a contract of sale on future delivery, 395.

Inspection, of goods, a necessary requisite to a sale, 329.

Interpretation, of gifts, 285 ; of will ; under the Mahomedan Law, 309, 314 ; under the Hindu Law, 317 ; under the English Law, 318, to 325.

Invalid sale, what is so called, under the Mahomedam Law, 419.

Inventory, when required to be taken in an estate, 244.

Jointure, what is so called, under the English Law, 216.

Joint property, gift of, under the Mahomedan Law, 274 ; under the Hindu Law, 279 to 281 ; will of, 312 ; sale of, 337, No. 4 ; mortgage of, 437.

Jujmans, how for heritable, 206.

Julkur, what is so called, 396.

Pali Yuga, the fourth age of the world, 24.

Koran Al, the basis of the Mahomedan. Law, 13.

Krita Yuga, the first age of the world, 24.

Kut-cobaleh, what is so called ; rights under, 442, seq.

Lameness, excludes from inheritance under the Hindu Law, 189.

Lapsed legacy, goes to the residuary legatee under the English Law, 323 ; or to the executor, 324.

Law, what, valid antecedent to the supremacy of the Company, 1 to 3 ; what at the present time, 9 to 12.

Legacy, to whom to be paid, 65 and Appendix ; void, lapses to the estate, 318 ; specific, 321 ; general, 322 ; residuary, 323 ; not heritable, 315, 325 ; exceptions under the English Law, 325.

Digitized by Google

Legatee, may be a witness to the will under the English Law, 302.

Legislative powers, of the East India Company, 5 to 8.

Lepers, are partially excluded from inheritance under the Hindu Law, 189.

Madana parajata, a Hindu Law book, 31.

Mahomedan Law, how far valid, 2, 3, 10; contents of 13 to 21; law of inheritance, 21; among the Soonees, 90 to 138; among the Shiits, 139 to 148; to be expounded by the law officers, 35.

Mahratta school, of the Hindu Law, 33.

Maiden woman, who inherits, under the Hindu Law, 185.

Maintenance, to females of a Hindu family, how settled, 208; when secured by a mortgage, 468; to a widow of a deceased son, 163; to persons excluded from the inheritance, 190.

Managing partner, cannot sell or mortgage the joint property, 337, No. 2, 436, 437.

Market sale, rules of, under the Hindu Law, 426.

Married woman, see wife.

Master of ship, cannot sell ship or goods without special power, 337, No. 1.

Menu, Institutes of, 24.

Mesne profit, rules of, regarding sales 420, 423; and mortgage 439 to 441.

Military officer, selling property to native princes, 335.

Minor, legacy to, to whom to be paid, 65, and Appendix; sale and pnrchase by, 334; mortgage by, 436.

Missing heir, see Absent heir.

Mitacshara, a Hindu Law book, 25, 30.

Mithila school of the Hindu Law, 31.

Mohunt, Devotee, who inherits under the Hindu Law, 182.

Mootwulee office of, not heritable under the Mahomedan Law, 138.

Mortgage, what it is, 432; requisites of; not established by registry. Second Mortgage, 433. Consent, express or implied, 434. Mortgage, common or usufructuary; established by a contract, or by the law, 435. Who can mortgage, 437. What

Digitized by Google

things are capable of being mortgaged, 437. Form of a mortgage contract; a pledge in the hands of a third party, 438. *Usufructuary mortgage*, what is so called; effect of, 439; payment when to take place, 440; pledge how to be redeemed, 441. *Conditional mortgage* by Bye-bil-wuffa, or Kut-cubaleh, what it is, 442; with or without possession of the property mortgaged, 443; with usufruct, 444; mortgager how to redeem, 445; mortgage how to become foreclosed, 446; mortgagee without possession, how to obtain possession in default of payment, 447; Conditional sale, when becomes annulled, 448; effect of a compromise after issue of process, 449. Mortgage established by law; Government for revenue, proprietors for rent, indigo planters for plant; attachment, 450. *Rights and obligations of Mortgagee*; right to detain, 451; effect when two articles are pledged to one person; or one to two, or by two to one, 451; bound to take care of the pledge; expenses for its keep and preservation, to be paid by whom, 452; not entitled to use the pledge; effect of transgression, 453; bound to pay damages for the loss and deterioration of the pledge, 454; entitled to pledge the thing to another, 455; entitled to preferable payment by means of the pledge, 456. *Rights and obligations of the Mortgager*; entitled to redeem, 457; not entitled to use the pledge, or to have it returned with a view of selling it, 458; bound to pay expenses for preserving it, 459; entitled to damages on the loss or the use of it, 460; not entitled to sell the pledge without the consent of the mortgagee, 337, No. 3, but it may be sold in execution of a decree, 461. *Effect of a mortgage*, 462; when the pledge belongs to another, or has been previously mortgaged, 463; when the mortgage is partly valid, partly invalid, 464. When the pledge is to be sold for other debts in execution of a decree, the decreeholder stands in the place of the seller and warrants quiet possession. On the meaning of Cir. Order, 4th September, 1840, 465. When mortgagee objects to the sale, how to proceed, 466; how, when he merely claims preferable payment, 467; how, when his claim is undetermined at the time, 468. Rights of mortgagee, when ceases; not by lapse of time, if he holds possession, 469.

Digitized by Google

Mother, right of inheritance under the Mahomedan Law, 106, 107; under the Hindu Law, 152, No. 3, 174; of Streedhun, 186; under the English Law, 220, 230. Power over inherited property under the Mahomedan Law, 89; under the Hindu Law, 152, 165, 166, 174. She takes a share on partition among sons, 199; not generally responsible for son's debts, 254, 256.

Native Christians, inherit from Hindu or Mahomedan relations, 188, their property, how inherited, 81.

Native revenue officers, cannot, but judicial officers can, buy lands sold for arrears, 335.

Nazir, may conduct sales in execution of decrees, 385; not entitled to any remuneration, 390.

Nephew, right of inheritance under the Mahomedan Law, 119, 121, No. 3; under the Hindu Law, 176, 178; under the English Law, 220, 230.

Niece, right of inheritance under the Mahomedan Law, 121, No. 3; under the Ehglish Law, 220, 230; under the Hindu Law, not entitled to any share, 152.

Notice of sale, for arrears of revenue, 349; for arrears of rent by sale of Putnee Talooks, 360; of other saleable tenures, 367; of personal property distrained for rent, 372; in execution of decrees, 379, 387.

Nul sale, what is so called under the Mahomedan Law, 419.

Nuncupative will, how far valid, 297, 298; under the English Law, 304.

Nuzzurs, are forbidden, 269.

Obligations, of deceased persons, devolve on whom, 234; of a purchaser, 407, seq.; of a seller, 391, seq.; of a donor, 290; of a donee, 291; of a mortgagee, 450, seq.; of a mortgager, 457, seq.

Obsequies, performance of, necessary to inherit; incompetency excludes under the Hindu Law, 151; are to be performed for three ancestors, 149; females cannot perform obsequies, except the widow, 152, No. 1.

Digitized by Google

Offices, how far heritable under the Hindu Law, 206, 207. Office of Mootwulee, not heritable under the Mahomedan Law, 138.

Optional conditions, under the Mahomedan Law, 332, Note, 1.

Ornaments and cloths, on partition under the Hindu Law, when to be divided, 198 ; under the English Law, 216. Wife's power over, under the Hindu Law, 184.

Outcast, is excluded from taking an inheritance under the Hindu Law, 188, 189.

Outlaws, cannot make wills under the English Law, 296.

Pagodas, offices attached to, how inherited, 205, 206.

Paraphernalia, widow's right to, under the Hindu Law, 198 ; under the English Law, 216 ; power over, under the Hindu Law, 184.

Parasava Madhava, a Hindu Law book, 30.

Partitión, among copartners, under the Hindu Law, who can demand, 192; when allowed, 193; how to be made, 194, seq. Self acquisitions, 195 ; recovered property, 196, 203 ; gifts, 197. What things are exempted from partition, 198. Partition among sons during mother's lifetime, 199 ; among brothers during father's lifetime, 200, 201 ; of acquisitions by means of joint property, 202 ; of recovered landed property, 203. Expenditure for the sole benefit of one partner, 204. Partition of privileges and rights, 205 ; of endowed property, 206 ; of the right to perform ceremonies, 206; of offices, 207 ; how made and ascertained, 210 ; of profits of endowment under the Mahomedan Law, 137 ; of the estate of a Mussulman, 132 to 134. Partition during lifetime by father, 264, seq. see Gifts.

Partners, how far responsible for the acts of each other under the Hindu Law, 191. Unproductive partner entitled to an equal share or partition, 202. Waste by, must be accounted for, 204.

Payment of purchase amount, at sale for arrears of revenue, when to be made, 351 ; of Putnee Talooks sold for arrears of rent, 362 ; of personal property sold for arrears of rent, 374 ; of property sold in execution of decrees, 381, 388 ; at private sale, when, 407. Effect of non-payment, 408 ; payment when

Digitized by Google

may legally be withheld, 409; payment by mortgager to redeem, 445; effect of non-payment in a conditional sale, 448; mortgagee has preferable right to payment, 456; payment under a mortgage, when to be made, 457.

Pawn, what is so called, 432, see further, Mortgage.

Pension, not subject matter of a gift, sale or attachment, 270, 339, No. 1.

Personal rights, are not subject matter of a gift, or a sale, 270, 339, No. 1. Wages how may be pawned, 437.

Personal property, distinction between personal and real property exists only under the English Law, 212.

Pious gifts, what are so called; have no preference over other gifts, with some exceptions, 282 to 284.

Posthumous children, inherit, 84.

Precedents, validity of, 40, 41.

Pre-emption, right of, under a contract, 332, 412; originating from the law; under the Mahomedan Law, 412. The right exists only with regard to real property, 413; to whom it belongs, 413; when it commences, 414. Duties of claimant, 415, 416. The right, when ceases, 417; cannot be sold, 339, No. 1, or renounced for a compensation, 417; may be renounced by a guardian, or by a father, 417; how to be evaded, 418. The right ought to be recognized as a common right, 419; existence of, disputed under the Hindu Law, 419.

Pregnant wife, rights of, on division of an estate, 135; see also 84.

Presents, bridal ones, how inherited under the Hindu Law, 185, 186; to a wife by the husband, 184, 187.

Primogeniture, right of under the Mahomedan Law, 89, 148; under the Hindu Law, 157; under the English Law, 218.

Privileges, heritable under the Hindu Law, 205, 206.

Property, distinction between *ancestorial*, 89, 154, 220, 221, and *self-acquired*, 89, 154, 196, 202, 220, 222; *real*, 212, 218 to 223, and *personal*, 212, 224 to 232; *lost and recovered*, 196, 203; *divisible*, and *indivisible*, 276 to 278; *joint*, as regards gifts of, 274, 275, 279 to 281; mortgage of 436, 437. *Ancestorial* property cannot be divided in unequal shares by father under

Digitized by Google

the Hindu Law, 264, 265 ; cannot be made a gift of, under the Hindu Law, without the consent of sons, 273.

Proprietor of lands, his right for rent due, 245, 368, 450.

Protector of widow, responsible for her husband's debts under the Hindu Law, 255.

Public servants, are not allowed to receive gifts from natives, 269.

Purchaser, obligations of, 407 to 409.

Purohit, office of, is heritable under the Hindu Law, 206.

Real, and personal property, distinction between, under the English Law, 212.

Recovered property, distinction of, under the Hindu Law, on partition, 196, 203.

Redemption, right of, may be stipulated for in a sale, 332 ; exists in a mortgage, or pawn, 457.

Registry, rights obtained by, 340, 433 ; does not substantiate a mortgage, 433.

Regulation law, contents of, 12, 36 ; how promulgated, 37.

Religion, difference of, no impediment to inherit, 131, 188.

Religious endowments, see Endowments.

Representative, of a deceased Person, who is, 234.

Representation, right of, what is so termed, 80 ; does not exist under the Mahomedan Law, 89 ; but under the Hindu Law, 158 ; and English Law, in some cases, 230.

Residuaries, who are so called under the Mahomedan Law, 90, 113 to 120.

Residuary legacy, what is so called, 323.

Residue, who take, under the English law, 324.

Retraction, of a gift under the Mahomedan Law, when valid, 287 ; not valid under the Hindu Law, 287 ; of a sale, when valid, 329 ; not valid under the Hindu Law ; see 329, note 4.

Return, what so termed under the Mahomedan Law, 90 ; how distributed, 128, 145.

Rights, of deceased persons, vest in whom, 234 ; of donee, 287 seq. ; of seller, 407, seq. ; of purchaser, 391, seq. ; of mortgagee, 451, seq. ; of mortgager, 457, seq. Rights transferred by a sale

Digitized by Google

for arrears of revenue, 355; and of rent, 364; in execution of a decree, 382, 465. Rights and appurtenances, what are, 396.

Sacrificial fees, are not fit subjects for a gift, or a sale, 270, 339, No. 1.

Saculyas, who are so called under the Hindu Law, 150.

Sale, what is a, 326. *Requisites of*, 327; consent how to be given, 328; when it may be retracted, 329. Right of inspection, 329, Payment and delivery may be postponed, 330. Conditional sales, 331, under the Mahomedan Law, 332; these rules how far effective, 333. Who can sell and purchase, 334; who cannot, for special reasons, 335. What can be sold, 336; what not, for want of proprietary right, 337. Owner can transfer his rights, 338. Things exempted from traffic, 339. Some sales are improper under the Mahomedan and Hindu Law, but legally valid, 339. *Form of a sale*; a clause, for making it heritable is unnecessary; signature of relatives, also unnecessary, 340. Earnest money, effect of, 341. Advance on work, effect of, 342. *Sales, public and private*, 343. Public sales according to the Regulations, for arrears of revenue, 346 to 357; conducted by whom, 346; where, 347; when, 348; how to be noticed, 349; order of sale, 350. Payment of purchase amount, 351. Sale, when final, 352; certificate of, and possession, 353; rights transferred, 354 to 356. Sale, how and by whom annulled, 357. Sales of Putnee Talooks for arrears of rent, 358 to 367; when to take place and at whose request, 358; by whom and where conducted, 359; when to be held, 360; how, 361; order of sale, 362; mode of obtaining possession, 363; rights transferred, 364; sale, how annulled, 365; costs of sale, 366. *Sales of other saleable tenures*, 367. Sale of personal property for arrears of rent, 368 to 376; when to take place, 368; by whom, 369; where to be held, 370; at whose request, 371; how to be noticed, 372; when to be held, how conducted, 373; payment of purchase amount, 374; objections to the sale to be decided by the Court, 375; costs of sale, 376. *Sales in exe-*

Digitized by Google

cution of decrees ; by whom conducted, 377 ; by the Revenue authorities, 378 to 384 ; by whom, where and when, 378 ; how to be noticed, 379 ; objections to the sale to be decided by the Court, 380 ; mode of sale, and payment of purchase amount, 381; mode of obtaining possession ; rights transferred to purchaser, 382, 465 ; annulment of the sale, 383 ; costs of sale, 384. Sale by the civil authorities, 385 to 390 ; by whom conducted, 385 ; what can be sold, 386 ; sale how to be noticed, 837 ; objections to the sale to be decided by the Court, 388 ; payment of the purchase amount, 388 ; annulment of the sale, 389 ; costs of sale, 390. *Obligations of the seller* ; delivery and warranty, 391 ; delivery how to be made, 392 ; where, 393 ; when, 394 ; not before payment unless otherwise stipulated, 395 ; how to be made, 396 ; fixtures, rights and appurtenances, Julkur, Jheel, Bunkur, 396. Of things sold by weight and measure, 397. Of specific things, 398. Expenses necessary for delivery are to be paid by the seller, 399. Warranty of quiet possession, and for secret faults. Parties may augment or diminish warranty, 400. Secret faults, what they are, 401 ; effect of, 402 ; when known to the seller, 403 ; effect, when the thing cannot be returned, 404, 405. Warranty, when ceases, 406. *Obligations of the purchaser*, 407 to 409. Payment of price, when to be made, 407. Effect of non-payment, 408. Order of Court, when necessary to dissolve a sale. Payment, when may legally be withheld, 409. *Annulment of sale* ; special causes of annulling a sale, 410. Auction sale ; when annulled, 411. Private sale, when, 412. *Right of pre-emption*, where exists, 413 ; when commences, 414 ; duties of claimant, 415, 416 ; right when ceases ; cannot be sold, 339, or relinquished for a compensation, 417. Right, when exists ; how to be evaded, 418. The right is equitable and should be upheld ; existence of, disputed under the Hindu Law, 419. *Effect of the annulment of a sale*, distinctions of the Mahomedan Law between a null, an invalid and an improper sale, 420 ; the fruits, when to be restored to the owner, 421 ; effect of deterioration and augmentations to the proper-

Digitized by Google

ty, 422. Actual proprietor entitled to recover the property and its fruits from the purchaser in a sale that was null; in an invalid sale only the property on restoring the price, 424. Effect when the property has been deteriorated or ameliorated; 425, or altered, 426. Exceptions under the Hindu Law, in case of a market sale, 427. Obligations of the seller towards the proprietor result from the general rules for damages, 428. Obligations of the seller towards the purchaser, when the property is recovered from him, 429; when only a part is recovered, 430. Obligations, when they cease, 431.

Samanodacas, who are so called under the Hindu Law, 150.

Sapindas who are so called under the Hindu Law, 150.

Schools, of the Hindu Law, 28 to 34.

Second mortgage, what it is; how effected, 433.

Secret faults, warranty for, in a gift, 290; in a sale, 401. Secret faults, what they are, 401. Effect of, in a sale, 402 to 406.

Self-acquired property, see Property.

Seller, his obligations towards the actual proprietor, 427; towards the purchaser, 391 to 406, 428, 465; when it ceases, 406, 430. Seller of spirits, not allowed to take goods or wearing apparel in exchange, 335, No. 7.

Serberakar, when to be appointed, 72.

Sharers, who are so called under the Mahomedan Law of inheritance, 96 to 112; rights of, to partition, see Partition; to pre-emption, see Pre-emption.

Shiites, rules of inheritance among, 86, 139 to 148.

Shureefeea, a Mahomedan Law book on inheritance, 21.

Sirajijyah, the Mahomedan Law of inheritance, 21.

Sister, right of inheritance under the Mahomedan Law, 109 to 112; under the English Law, 221, 230; not entitled to inherit under the Hindu Law, 152, 186; but takes for her son, when, 178. To be married by means of the joint property under the Hindu Law, 199.

Sister's daughter, right of inheritance under the Mahomedan Law, 121, No. 3; under the English Law, 221, 230, 232; not entitled to inherit under the Hindu Law, 152, 186.

Digitized by Google

Sister's son, right of inheritance under the Mahomedan Law, 121, No. 3; under the English Law, 221, 230, 232; under the Hindu Law, 178; to Streedhun, 186.

Slavery, how far abolished, 339, No. 2; not an impediment to taking an inheritance, 131, 188.

Smritis, a part of the Hindu Law, 22, 23.

Smriti Chandrica, a Hindu Law book, 34.

Smriti Samoochaya, a Hindu Law book, 31.

Smritisara, a Hindu Law book, 31.

Son, right of inheritance under the Mahomedan Law, 117; under the Hindu Law, 156; to Streedhun, 186, 187; under the English Law, to real estate, 218; to personal estate, 224. No right of primogeniture under the Mahomedan Law, 89; except among Shiites, 148; nor under the Hindu Law, 156; except in the succession of some landed estates, 157; but under the English Law, to real estate, 218; not to personal estate, 226. Distinction between different sorts of sons under the Hindu Law, abolished, 156; they take according to number, not according to number of mothers, 156; their interest in family property under the Hindu Law, 273; none under the Mahomedan Law, 89, 273; or English Law, 319. Right to self acquired property under the Hindu Law, 196, 202. Liability for father's debts, 251; under the Mahomedan, and the English Law, 234, 235. Cannot be disinherited under the Mahomedan Law, 88; nor under the Hindu Law, without cause, 153; but under the English Law, 319. Must bring in what he has received as an advance under the English Law, 227. A father may make an unequal partition during lifetime among his sons under the Mahomedan, and also under the Hindu Law, 264; except of immovable ancestorial property, 265; childless wife must then have a share, 266, 267, and grand-mother, 268.

Son's daughter, right of inheritance under the Mahomedan Law, 101 to 103; under the English Law, 218, 228; no right under the Hindu Law, 152, 186.

Son's son right of inheritance under the Mahomedan Law, 117; under the Hindu Law, 158, 161; under the English Law,

Digitized by Google

218, 228; must pay his grandfather's debts under the Hindu Law, 253.

Soonees, Law of inheritance, among, 86 to 138.

Soonnut, what is so termed in the Mahomedan Law, 14.

Specific legacy, effect of, 321.

Spirituous liquor, debt for, not to be paid by sons under the Hindu Law, 251.

Sruti, a part of the Hindu Law, 27.

Stepmother, not entitled to inherit, 174; but entitled to maintenance under the Hindu Law, 193, note 1, 208.

Streedhun, what is so termed, 184; how inherited under the Hindu Law, 183 to 188.

Subhodhini, a Hindu Law book, 29.

Succession, duties of the Court relative to, 45 to 54; to estates of European British subjects, 54; and Appendix. Succession according to the Mahomedan Law, of Soonees, 87 to 138; of Shiites, 139 to 148; according to the Hindu Law, 149 to 181; to Streedhun, 183 to 187; according to the English Law, 211 to 232; according to the Portuguese law, 233; see further Inheritance.

Successor by contract, who is, under the Mahomedan Law, 92.

Superintendence, of endowment, see Endowment.

Supreme Court, its authority limited on account of abuse of power, 7.

Sutya Yuga, the first age of the world, 24.

Tender, when to be accepted in a sale, 328; legal tender what is, 445, 448.

Testament, what is so called, 292, see Will.

Testamentary power, under the Mahomedan Law, 294; under the Hindu Law, 295; under the English Law, 296.

Tools, and materials of workmen and agriculturist cannot be attached for arrears of rent before decree, 339, No. 3, but after decree, 386.

Traitors, cannot make a will under the English Law, 296.

Trita Yuga, the second age of the world, 24.

Digitized by Google

Uncle, right of inheritance under the Mahomedan Law, 121, No. 4 ; under the Hindu Law, 179 ; under the English Law, 221, 232.

Universal legatee, under the Mahomedan Law, 94.

Usage, or custom, force of, 40 to 43 ; how to be proved, 44 ; may establish right of primogeniture, 157 ; right of pre-emption, 418.

Usufructuary mortgage, effect of, 435, 439 ; payment, when to take place, 440 ; pledge, how to be redeemed, 441, 444.

Veeramitordaya, a Hindu Law book, 30.

Vender, obligations towards the actual proprietor, 427 ; towards the purchaser, 391 to 406, 428, 465 ; when ceases, 406, 430. Vender of spirits, cannot take goods or wearing apparel in exchange, 335, No. 7.

Verbal Wills, valid under the Mahomedan and Hindu Law, 297, 298 ; but not gererally under the English Law, 304.

Vices, exclude from inheritance under the Hindu Law, 189. Vices in a thing sold, see Secret faults.

Vivada Bhangarnawa, 26, 29. *Chandra*, 31. *Chintamoni*, 31, and *Ratnarara*, 31. Hindu Law books.

Vivadarnavaseta, a Hindu Law book, 29.

Vyavahara Chintamoni, 31. *Madhava*, 30, and *Tatwa*, 29. Hindu Law books.

Vyavastharnava, a Hindu Law book, 29.

Warranty, in a gift, 290 ; in a sale, 400 ; of secret faults, 401 ; effect of, 402 ; when known to the seller, 403 ; when the thing sole cannot be returned, 404, 405 ; effect, when the property is recovered from the purchaser, 528 ; when only part is recovered, 429 ; effect, when ceases, 406, 430.

Waste, by widow of husband's estate under the Hindu Law, 152, 163, 164.

Widow, right of inheritance under the Mahomedan Law, 99 ; under the Hindu Law, 152, 163 to 167 ; under the English Law, 216, 217. Several widows take equal shares under the Hindu Law, but the right is considered as vested in one individual,

Digitized by Google

163. Widow of a deceased son dos not inherit from his father, 163. Widow's power over inherited property under the Mahomedan Law, 89 ; under the Hindu Law, 152, 163 *to* 165. Descent of her own property under the Mahomedan Law, 89 ; *under* the Hindu Law, 183 to 187. Widow must reside with her husband's relations under the Hindu Law, 167 ; can perform funeral obsequies, 152 ; cannot alienate her husband's property, except for good causes, 165, 166, 270, 334, 337, No. 4 ; cannot make gifts of it, except for religious purposes, 270 ; can alienate her peculiar property, except real property received from husband, 262, 334, (see also Ornaments). Widow is entitled to maintenance under the Hindu Law, when not entitled to the inheritance, 208, 266 ; maintenance, how to be settled, 208 ; payment of her debts, 255.

Wife, Lagacy to, to whome to be paid, 67 ; her connubial state under the Hindu Law, 164 ; under the English Law, 213 ; heirs to, under the Mahomedan Law, 90, under the Hindu Law, 183, seq. ; under the English Law, 213, seq. Not generally responsible for her husband's debts, 254, 255. Can make gifts of her own property, 262. Childless wife entitled to a share on partition among sons by her husband under the Hindu Law, 266, 267, but she cannot make a gift of such share, 270. Wife can make a will under the Mahomedan and Hindu Law, 294, 295 ; but not generally without hnsband's consent under the English Law, 296. Can sell and mortgage her own property, 334, 436, cannot generally make any purchase without consent of husband, 334.

Will, what is so termed, 292 ; always revocable, 288, 292 ; who can make one, under the Mahomedan Law, 294 ; under the Hindu Law, 295 ; under the English Law, 296. Will, how to be made and attested, 297 to 306 ; how to be annulled, revoked or altered, 307, 308 ; cannot be made in favour of relatives, 310 ; nor of more than one-third of the estate under the Mahomedan Law, 311. Future, divisible and joint things, may be bequeathed under the Mahomedan Law, 312. Unaccepted bequests are not heritable, 315. Pious bequests have no pre-

Digitized by Google

ference over other bequests, 316. Effect and interpretation of wills, 309, 317; under the English Law, 318; the entire estate may be bequeathed, 319; by different legacies, 320 to 322. Lapsed legacy lapses to the estate, 323; if there be no residuary legatee, it goes to the executor, 324; legacy, when heritable, 325.

Witnesses, are requisite to a will under the English Law, 300 to 302; must be present at the time and at the execution of the will, 300; are requisite to a written deed of gift, 285; of sale, 340; and of mortgage, 438.

Woman's property, see Streedhun.

Zemindar, cannot grant lands rentfree, 270; can sell his estate or parts of it, but the portion must be divided off, and the rent ascertained, 338; may bequest his self-acquired estate to one heir, 154.

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google